No. 92

JAMES H. HARRIS, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Supreme Court of the United States

OCTOBER TERM, 1967

No. 92

JAMES H. HARRIS, PETITIONER

vs.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. A]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term
Grand Jury Sworn in on September 1, 1964

[File Endorsement Omitted]

Criminal No. 894-'64

Grand Jury No. 1081-64

Violation: 22 D.C.C. 2901
(Robbery)

THE UNITED STATES OF AMERICA

v.

JAMES H. HARRIS, JERRY A. HINES

INDICTMENT—filed October 5, 1964

The Grand Jury charges:

On or about August 29, 1964, within the District of Columbia, James H. Harris and Jerry A. Hines, by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Paul B. Herring, property of Paul B. Herring, of the value of about $185.05, consisting of the following: one billfold of the value of $10.00, $150.00 in money, one wrist watch of the value of $25.00 and one registration card of the value of $0.05.

A TRUE BILL:

/s/ [Illegible]
Foreman

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 894-64

UNITED STATES OF AMERICA

v.

JAMES H. HARRIS and JERRY A. HINES, DEFENDANTS

Washington, D. C.

TRANSCRIPT OF TRIAL—Wednesday, January 13, 1965.

The above-entitled case came on for further trial before HONORABLE SPOTTSWOOD W. ROBINSON III, United States District Judge, and a jury, at 10:25 a.m.

APPEARANCES:

On behalf of the Government:

David Epstein, Esq.
Assistant U. S. Attorney

On behalf of the Defendant Harris:

Paul Weinstein, Esq.

On behalf of the Defendant Hines:

Ira J. Crickenberger, Esq.

[fol. 4]

* * * *

MOTION TO SUPPRESS

MR. WEINSTEIN: May it please the Court, at this time, as counsel for the defendant James Harris, I make a motion that certain evidence, to wit, a registration card that was supposed to have been found on the floor of [fol. 5] the defendant's automobile at the No. 6 Precinct

be suppressed on the basis that the said search and seizure was a result of a violation of the defendant's constitutional rights under the Fourth Amendment, that the search and subsequent seizure was not incident to an arrest, that the search was an exploratory search of a general nature, that a warrant was issued based upon the unreasonable search, that a warrant was issued merely for evidentiary material, which was not the proper grounds for the issuance of the warrant.

At this time I would like to call the defendant, James Harris, to the stand.

MR. EPSTEIN: Your Honor, I would like to object or register an objection that the motion is untimely. The rules call for the filing of a motion ten days in advance of trial. The defendant was aware of the recovery of the item that is now sought to be suppressed inasmuch as he was asked at the precinct whether or not or how he could explain the presence of this particular item in his automobile.

THE COURT: Very well. I will overrule the motion; I mean, I will overrule the Government's motion. Did you wish to make a statement at this time?

MR. EPSTEIN: May I reserve making a statement?

THE COURT: Yes, you may.

MR. EPSTEIN: I prefer to reserve.

[fol. 6] THE COURT: Now, let me be clear on this. This is a motion on behalf of only one of the two defendants, is that correct?

MR. WEINSTEIN: Your Honor, may I have your indulgence for a minute?

THE COURT: Very well.

MR. WEINSTEIN: I will consult with counsel.

This motion is being made only on behalf of James Harris.

THE COURT: You may proceed, Mr. Weinstein.

Thereupon,

JAMES HILLARD HARRIS,

the defendant, was called as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEINSTEIN:

Q State your name, please.

A James Hillard Harris.

Q Now, drawing your attention specifically to the 30th day of August, did there come a time when you were arrested?

A Yes, there was.

Q Please tell us the address where you were arrested [fol. 7] at.

A It was the 2500 block of M Street, Northwest.

Q Approximately what time?

A Around 1:00, maybe 1:30.

Q And would you give us the circumstances surrounding your arrest?

A Yes. I was leaving this establishment on the way to my car; and as I was almost ready to get in my car, the police come over and come across the street with their car and arrested me when I was attempting to get in my automobile. So thereupon I was searched. And I had a pocket knife that was taken away from me. And one police officer got in the other side of the car and searched my car, and at that time they arrested me and put me in the patrol wagon. They didn't find anything in my car at that moment. They said they would have it towed in.

Q Where was your automobile parked?

A In the 2500 block of M Street, between 26th and 25th, Northwest.

Q Was it parked lawfully?

A Yes, it was.

Q There were no no parking signs or other signs to prevent you from parking your car there?

A Not as I can remember.

[fol. 8] Q Had you gotten into your automobile when the officer stopped you?

A I was attempting to get in my car.

Q Do you remember which officer stopped you?

A I think it was either Baker or Drescher. I think it was Officer Baker.

Q And would you please tell us what he did; what words he used; what he said to you or what he did physically to stop you from getting into the automobile?

A He told me that I was under arrest, that my car was seen in a robbery.

Q At this point were you standing—where were you standing?

A I was standing alongside the door, the driver's door of my car.

Q Was the door open or closed?

A It was open. I was just getting ready to open the door.

Q Did you ever enter the automobile?

A No, I didn't enter the car.

Q Who closed the door?

A One of the officers—I believe I closed the door or one of the officers. I don't remember. Maybe I closed the door.

[fol. 9] Q Did they then put you in a police cruiser?

A No, he stood there and he searched me first and asked me what did I have in my pockets, did I have a weapon or anything? I told him a knife. At this time the other officer went around to the other side of the car, got in and started in the glove compartment and giving it a general search.

Q Did you observe this?

A Yes, I was watching. I was standing there.

Q Approximately how long did the officer search the automobile?

A I don't know. I guess I was there maybe about seven or eight minutes.

Q You say he opened up the glove compartment?

A Yes, sir, opened up the glove compartment, looked on the floor, and all around on the seats and everything.

Q Did he subsequently get out of the automobile?

A Yes, he did.

Q Did he close the door?

A Yes, he did.

Q Subsequent to this, did they put you in a police cruiser?

A They put me in a police cruiser, both of us.

Q Just tell us what they did as far as you are [fol. 10] concerned.

A They put me in the police cruiser and told me they would have my car towed in. And then they drove me on to the precinct.

Q And what precinct did they drive you to?

A No. 6.

Q Where is No. 6 Precinct located at?

A It is uptown off of 13th Street somewhere.

Q Could you estimate for us the amount of time it took to drive from 25th and M Streets, Northwest, to No. 6 Precinct?

A Maybe twenty minutes, maybe twenty-five minutes.

Q Now, after you arrived at the precinct, where did they take you?

A They took me in a room and got to questioning me about this robbery.

Q Who questioned you?

A Both of the detectives.

Q Do you know their names?

A Yes, Drescher and Baker, Officer Drescher and Officer Baker.

Q Was the defendant Hines present while they were questioning you?

A Yes, Hines was present.

[fol. 11] Q At approximately what time did they stop questioning you?

MR. EPSTEIN: Your Honor, I object to this questioning. I don't quite see the relevance of it with respect to the motion to suppress.

THE COURT: What is the relevance, Mr. Weinstein?

MR. WEINSTEIN: Your Honor, I want to show the amount of time that elapsed between the time he arrived at the police station and the time they brought the automobile to the precinct.

MR. EPSTEIN: He can ask such a question.

THE COURT: Your questions are relating to the activities that occurred during this period of time, whatever it may have been, and do you suggest that there is any relevance in the activities as distinguished from the interval of time?

MR. WEINSTEIN: No, I don't. I will rephrase that question.

THE COURT: All right.

BY MR. WEINSTEIN:

Q Do you recollect about what time they started questioning you?

A Right after I arrived at the precinct they started questioning me.

[fol. 12] Q Do you recollect at what time that was?

A I guess maybe it was a half hour to forty-five minutes elapsed between the time they arrested me and questioned me.

Q Do you know what time they arrested you?

A Around one or one-thirty, between that time.

Q Do you recollect how long they questioned you at the precinct?

MR. EPSTEIN: Again, Your Honor, I object. The question could be asked as to when the automobile arrived.

THE COURT: I will overrule the objection. He may answer that question.

BY MR. WEINSTEIN:

Q How long did they question you at the precinct?

A I guess about an hour.

Q Now, did there come a time when your automobile arrived at No. 6, if you know the answer?

A Yes, my automobile arrived at No. 6. The driver come in, the tow truck driver come in and informed the officer that my car had arrived.

Q At what time?

A That was probably about an hour later after I had been at the precinct, and Officer Baker said he was going out and search that car again; and he was gone [fol. 13] about maybe two or three minutes and come right back in with the registration card. And he comes in with the registration card and he said, "Well, we got you this time," or "we got you now."

Q Did he show you any warrant for searching the car?

A No, he didn't.

Q Did he show you the card?
A He just flashed it at me. I didn't get a good look at it, no, I didn't.
Q Did he ask you about the card?
A He asked me about the card. I told him, no, it wasn't in my car and it wasn't in there when he searched it before when they arrested me.
Q Did he tell you where they found the card?
A He said they found it on the floorboard of my car.
MR. WEINSTEIN: I think that is all the questions I have.
THE COURT: Very well. Mr. Epstein.

CROSS EXAMINATION

BY MR. EPSTEIN:

Q Is your car a—
THE COURT: May I ask a question. Mr. Crickenberger, are you interested in this motion to any extent? [fol. 14]
MR. CRICKENBERGER: No.
THE COURT: Very well. If for any reason anything should develop and you wish to have an opportunity to participate, let me know. Very well, Mr. Epstein.

BY MR. EPSTEIN:

Q Is your car a '53 Ford with D. C. tags 2 X 751?
A That is correct.
Q Is this the same car that was used the night before in the robbery?
MR. WEINSTEIN: Objection, Your Honor.
THE COURT: What is the relevance of that, Mr. Epstein?
MR. EPSTEIN: I will withdraw the question.
THE COURT: All right.
MR. EPSTEIN: On second thought, Your Honor, there is a considerable relevance.
THE COURT: What is it?
MR. EPSTEIN: The Government's theory is that this was an instrumentality of a crime and, as such, it could be seized.

THE COURT: Well, I understand from the evidence that I have heard so far that the car was searched at the time the defendant was arrested considerably later [fol. 15] and at an entirely different place, according to Mr. Harris's testimony, it was searched again.

Does the Government contend that the registration card in question was produced in consequence of anything other than the second search, other than the activity after the car had been removed from the scene of arrest and had been taken to the police station?

MR. EPSTEIN: No, Your Honor. Whether there was a first search or not, I am not willing to say at this time because I have not heard the testimony of the officer. The card was discovered at the precinct when the car was at the precinct.

THE COURT: And this, of course, was substantially after the arrest. Now, what is the relevance of the question that you are about to put to this witness as to the activities which occurred at that time?

MR. EPSTEIN: The nature of the relationship between him and the automobile. If the car was used as an instrumentality of the crime, that is, as a get-a-way car, then one set of circumstances are created. If the car was not used as an instrumentality of the crime, then a different set of arguments or situations is created.

THE COURT: Well, let me ask this question. Maybe this will eliminate my confusion. Am I correct in my [fol. 16] understanding that the defendant's objection is not to the seizure of the automobile and the towing of the automobile to the precinct station, but his objection relates rather to what this defendant conceives to have been a second search which was made of the vehicle once it arrived at the precinct station? Is that your position, counsel?

MR. WEINSTEIN: No, Your Honor. My position is, one, that the impounding of the automobile after the first search was an illegal impounding, that the police had no right to impound this automobile after they had arrested the man and taken him into custody and searched the car at that point. Also, the second point is that the second search was illegal, and that any evidence found

as a result of the second search was a violation of this defendant's constitutional rights.

So that there are two points, Your Honor.

THE COURT: Very well. All right. I will sustain the objection. I sustain it on the ground that the question goes beyond the scope of the direct examination.

Now, Mr. Epstein, you will understand that that does not preclude the Government from calling an appropriate witness to prove that circumstance. There has been no testimony by the defendant to any of the events prior to the date of his arrest.

[fol. 17] BY MR. EPSTEIN:

Q Are you the same James H. Harris who was convicted of robbery in 1950?

A That is right, yes, sir.

Q And after you got to the precinct—rather, where was Hines when you were arrested?

A As I was leaving the establishment, Hines was on the way out behind me. At that time he asked me to loan him three dollars, and I told him I couldn't loan him any more money, that I had given some money away; and at that time he was on the way to his car and I was on the way to mine; and we were both approached.

Q And how far away from your car were you?

A I was at my car when I was approached.

Q Had you opened the door yet?

A I had my hand on the door, but I don't remember opening the door.

Q You don't remember opening the door?

A No. I was not in my car.

Q And who else was there? Aside from the police officer, who saw you at that time?

A Well, just the two detectives, and I think there was a patrol wagon and some more officers there.

Q Were there any other persons there?

[fol. 18] A No, only Hines getting in his car, on the way to his car.

Q How far away from you was Hines?

A Maybe twenty feet.

Q Had he gotten in his car yet?
A I don't remember.
Q Which direction was your car facing?
A My car was facing towards Georgetown College, toward Key Bridge.
Q And which way was Hines' car facing?
A The same way, the same side of the street.
Q Behind yours or ahead of yours?
A Ahead of mine.
Q After you got to the precinct, did you have an occasion to look out the window to see if it had started to rain?
A I don't know nothing about whether it was raining or not. It wasn't raining at the time I got in the car.
Q Not at that time—at the precinct?
A At the precinct.
Q Were you near a window? Did you look out the window to see if it was raining?
A No, I wasn't near a window.
Q You don't know what kind of weather conditions [fol. 19] were present at that time, is that correct?
A It wasn't raining at the time I was arrested.
MR. EPSTEIN: I have no further questions of this witness.
THE COURT: Is there anything further, Mr. Weinstein?
MR. WEINSTEIN: No, Your Honor.

BY THE COURT:

Q Mr. Harris, I would like to ask you a few questions. According to your best recollection, what time of the day was it when you were stopped and arrested?
A It was August the 29th.
Q Yes, I know. August the 29th?
A August the 30th, Sunday, August the 30th. I am sorry.
Q Very well. Now, what time of the day was it?
A It was around, it was in the afternoon, around one or one-thirty. That is the most that I can, you know, remember.
Q One or one-thirty?
A Yes, sir.

Q You have given testimony that at a later time a statement was made in your presence that your car had been towed to and had arrived at the precinct station. About what time was it that this statement was made?

[fol. 20] A I don't understand the question, sir.

Q You testified that while you were at the precinct station and after you had been there for some time someone said in your presence that your car had been towed to the precinct station.

A Yes, that was Officer Baker mentioned that to me. That was maybe about an hour after I was at the precinct.

Q Well, how much time was that after you were arrested?

A I would say about an hour, hour and a half, to my best recollection.

Q You further testified that a police officer in your presence made a statement that he would make a further search of your automobile.

A That is right, sir.

Q How much later was this after?

A That was about ten minutes after he was notified the car had arrived by the tow truck driver.

Q What was the officer's name who made the statement?

A Officer Baker.

Q Beg pardon.

A Officer Baker.

Q And you also testified that a registration card was subsequently produced.

[fol. 21] A That is right.

Q Purportedly having been found in your automobile. About how much later was this after Officer Baker had made the statement to which you testified?

A It was about five minutes later.

Q Who showed you the card at the precinct station?

A Detective Baker.

Q Did Detective Baker make any statement in your presence as to where the card was found, as to where in the automobile the card was?

A He said he found this card on the floorboard of my car. He come back in and said, "We found this registration card on the floorboard of your automobile," and says, "We got you now." Those are the words he said.

THE COURT: Very well. Anything further, Mr. Weinstein?

MR. WEINSTEIN: No, Your Honor.

THE COURT: Mr. Epstein.

MR. EPSTEIN: No further questions, Your Honor.

THE COURT: You may step down, Mr. Harris.

(The witness resumed his seat at the counsel table.)

MR. WEINSTEIN: At this time I am going to call the defendant, Mr. Hines.

[fol. 23]

* * * *

MR. WEINSTEIN: Mr. Hines.

Thereupon,

JERRY ANTHONY HINES, one of the defendants, was called as a witness for the defendant Harris, and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEINSTEIN:

Q Would you please state your name?

A Jerry Anthony Hines.

Q Mr. Hines, drawing your attention specifically to August the 30th, 1964, did there come a time when you were in the vicinity of 25th and M Streets, Northwest, Washington, D. C.?

A Repeat that. I didn't quite get you.

Q Drawing your attention specifically to August the [fol. 24] 30th of 1964, were you in the vicinity of 25th and M Streets, Northwest, Washington, D. C.?

A Yes, I was.

Q Did there come a time when you were leaving a certain premises in that vicinity?

A Yes, there was.
Q You departed out of certain premises there?
A Yes, I was.
Q Could you tell us at what time that was?
A It was in the afternoon. I know it had been between one and after one. I don't know exactly what.
Q Now, when you left that premises, were you alone or were you with someone else?
A When I came there I was alone; and when I was on my way out, I was alone; but Harris happened to walk out just ahead of me.
Q Did Mr. Harris leave at approximately the same time that you did?
A Approximately, yes.
Q Now, as you left this premises, where was your automobile parked?
A It was parked right in front of the door in which place that I came out of the house.
Q Now, immediately upon leaving this premises, did [fol. 25] Mr. Harris and you attempt to enter your automobiles?
A No. What happened was this. I came out right behind him, because him and I both was in a game together. So he won. So I just happened to say, "Let me owe you three dollars," which I don't even know him. So he said, "No, I gave away enough." So that is all that was said. So I said, "Well, O.K." So I goes around and gets in my car; and as soon as I gets in my car and starts up, I don't know where the police came from. They runs down to my car and they said, "Hold it, we want you."
Q Now, do you know where Mr. Harris was at this time?
A No, I don't.
Q Did the officers instruct you to get out of your automobile?
A Yes, they did.
Q Did you get out?
A Yes.
Q On which side did you get out?
A On the driver's side, the left-hand side.

Q When you got out of the automobile, did you notice where Mr. Harris was?

A I didn't notice, no, I didn't.

Q Did there come a time subsequent to this that you [fol. 26] and Mr. Harris were put together?

A Yes, they put him and I both in the scout car.

Q Was there any conversation that took place while either you, while you were standing beside your car or while you and Mr. Harris were standing beside the automobile before they put you into the cruiser?

A Well, they was talking to Harris. They wasn't even talking to me. All they did was ask me for my identification.

Q Do you know which officer was talking to Mr. Harris?

A No, I don't. I don't know one from the other.

Q Were you standing there while this conversation took place?

A Yes, I was.

Q Did you hear what was said between the officer and Mr. Harris?

A Well, I heard, but I really couldn't, you know, repeat none of it.

Q Did you observe another officer go around to the passenger side of Mr. Harris's car and open the door?

A No, I didn't.

Q Did you observe either of the officers search Mr. Harris's car?

A Well, I know when he ordered me to get out of my [fol. 27] car, they was up the street at Harris's car.

Q Now, where were the two officers, if you know?

A If I can remember, one was standing by me; and then there was a patrol wagon; and then the other one was standing over there with Harris. I don't remember exactly what they was doing.

Q Did any of the officers tell you you were under arrest?

A Yes, the one that walked to my car, he said, "I want you for robbery."

Q What time was this?

A It was, like I said, in the afternoon, between one and one-thirty.

Q Now, how long did you remain at the scene of 25th and M Streets before they transported you in a cruiser to No. 6 Precinct?

A It must have been about between five and ten minutes.

Q Could you estimate for us how long the ride was from that point to No. 6 Precinct?

A Yes, I think it took us about a half hour.

Q Do you know where No. 6 Precinct is?

A No, I don't. It was the first time in my life I had ever been there.

[fol. 28] Q When you arrived at the police station, did they put you and Mr. Harris in a room?

A Yes, they did.

Q Do you recollect at what time this was?

A Well, I didn't look at the time whatsoever.

Q Did there come a time when they started some interrogation?

A Yes, they did.

Q How long did that last?

A That lasted about an hour or more.

Q Now, did there come a time when a tow truck driver came into the room where you and Mr. Harris were seated?

A Yes. They had questioned him and I. So then they brought the witnesses in, you know.

Q Answer this question. Did there come a time when a tow truck driver came into the room where you and Mr. Harris were seated?

A No, he didn't come in there. They were getting to lock us up. They had booked us. We were standing out in the hall. Then the man came in with the tow truck and said that the car is here, and that is when the detective explained this.

Q Do you remember what time that was?

A No, I don't.

[fol. 29] Q It was after you were interrogated, however?

A Right.

Q What did the tow truck driver say to the officer?
A He said, "The car is here."
Q What did the officer reply?
A The officer said, "Well, I am going out and search the car again."
Q Do you know which officer this was?
A No, I don't. I don't know one from the other.
Q Did he go out and search the car, or did he leave?
A He went out, and he was gone maybe one or two minutes, something like that, and came right back.
Q And what did he have when he came back?
A I can't tell you what he had, because all he did was flash something, "Here we got them now."
Q Did he say anything to Harris about searching the automobile?
A Yes. He said, "I am going out and search it again." That is what he said.
MR. WEINSTEIN: I think that is all the questions I have, Your Honor.
THE COURT: Mr. Epstein.

[fol. 30] CROSS EXAMINATION

BY MR. EPSTEIN:

Q You testified that when Harris was arrested you didn't see whether Harris was inside or outside the automobile, is that correct?
A That is correct.
Q And you didn't see whether or not any of the officers searched Harris's car at that time either, is that correct?
A That is correct.
Q And the only thing you were concerned with most of all was the fact that the officers were arresting you?
A That is right.
MR. EPSTEIN: No further questions.
THE COURT: Anything further, Mr. Weinstein?
MR. WEINSTEIN: Nothing.
THE COURT: You may step down, Mr. Hines.

(The witness resumed his seat at the counsel table.)

THE COURT: Call your next witness.

MR. WEINSTEIN: That is all the witnesses I have.
MR. EPSTEIN: I call Officer Baker.

[fol. 31] Thereupon,

FRANCIS EUGENE BAKER, JR.,

was called as a witness for the Government and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EPSTEIN:

Q Would you please state your name, rank, and duty assignment?

A Francis Eugene Baker, Jr., detective assigned to the Sixth Precinct.

Q And how long have you been a member of the Metropolitan Police Department?

A A little over eight and a half years.

Q Now, directing your attention to August 30th, 1964, did there come a time when you arrested one James Hillard Harris?

A Yes, sir.

Q And do you see him here in the courtroom?

A Yes, I do.

Q Can you identify him, please?

A That gentleman sitting over there in the corner of the bench next to Mr. Weinstein.

MR. EPSTEIN: May the record indicate the defendant Harris has been identified?

[fol. 32] THE COURT: Very well.

BY MR. EPSTEIN:

Q Now, at the time that you arrested him, did you have any information as to any automobile?

A Yes, sir.

Q Being involved in a robbery committed on August 29th, 1964?

A Yes, sir.

Q And did you also have the description and the license tags of that automobile?

A Yes, sir.

Q And did you see the automobile on that August 30th?

A Yes, sir.

Q In some location in the District of Columbia?

A Yes, sir.

Q And where was that?

A In the 2500 block of M Street, Northwest.

Q And where was the defendant Harris at the time that you arrested him?

A In behind the wheel of the car at the time of the arrest.

Q Did you see him heading towards the automobile?

A Prior to arresting him, he was standing on the curb talking to another gentleman.

[fol. 33] Q And do you identify the other person here in the courtroom?

A Yes, the defendant Hines sitting next to his attorney.

MR. EPSTEIN: May the record indicate the defendant Hines has been identified?

THE COURT: Very well.

BY MR. EPSTEIN:

Q And then the two men parted?

A That is correct.

Q And the defendant Harris went into the automobile?

A Yes, sir.

Q And did you then go over and inform the defendant Harris that he was under arrest?

A Yes, sir.

Q Now, what if anything did you do following that?

A I also placed Mr. Hines, the defendant, under arrest.

Q Now, were you in company with some other police officer?

A Detective Drescher was with me in the cruiser on that day.

Q And did the patrol wagon come shortly thereafter?

A There was a patrol wagon on the scene, but we

[fol. 34] transported them to No. 6 Precinct in a cruiser.

Q And this automobile in which you found Harris, was that a 1953 Ford with D. C. tags 2 X 751?

A That is correct.

Q And where was the automobile when you transported Harris and Hines to the Precinct?

A It remained parked at the curb in the 2500 block of M Street. At that time we notified the Metropolitan Police crane service to come and pick up the car.

THE COURT: Why did you do that, Officer?

THE WITNESS: Because the car was described in the lookout wanted for robbery and so forth, and I was going to impound it as evidence in the case.

THE COURT: As I understand, at some time prior to the time at which Mr. Harris was arrested, you had received information that a car fitting the description of Mr. Harris' car, bearing license plates which were the same license plates that you found on the Harris car—in other words, you had that information prior to the time that you placed him under arrest, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Was there any discrepancy between the information that you had received describing the car or as to the license number and the actual descrip-[fol. 35] tion of the Harris car and the license tags put on that car? In other words, I am trying to find out as to whether or not you had a perfect match of your information with the automobile that Mr. Harris was in.

THE WITNESS: The lookout for the auto and the auto itself were identical.

THE COURT: Very well. When did you receive the lookout? When did the offense to which this arrest was related, when was it that it is supposed to have occurred?

THE WITNESS: It occurred on Saturday night about 11:45 on the 29th.

THE COURT: Of August.

THE WITNESS: And it first came to my attention when I reported for work at 7:30 a.m. on the 30th and I was assigned to this robbery case.

THE COURT: Was it at that time, Officer Baker, that you received the information describing the automobile and giving the license plate number?

THE WITNESS: Yes, sir.

THE COURT: Very well.

BY MR. EPSTEIN:

Q Did you, as a result of having the license plate number, make a check with the Motor Vehicle Department to determine the ownership of the car?

[fol. 36] A I did.

Q And did you determine whose car it was?

A Yes.

Q And whose was it?

A Mr. James Harris at—I will have to refresh from my notes on his address. It is right in the vicinity where the car was located.

Q In other words, you went to the—

A To his address.

Q You went to his address, and that is where you saw the defendant Harris entering and getting into his automobile?

A Close to his address, in the general vicinity.

Q All right. Now, did there come a time when the automobile—when did you notify the police crane service to go and pick up the automobile?

A Oh, approximately a few minutes after the arrest.

Q Was this over the radio?

A I believe, I am not positive of that. I think I did notify them over the radio. I notified the police dispatcher.

Q And did there come a time when you saw the automobile again?

A That is correct, approximately 3:00 o'clock that same afternoon.

THE COURT: May I interrupt you just a moment. [fol. 37] What time was it, Officer Baker, approximately at which Mr. Harris was arrested?

A One-thirty p.m. on the 30th.

THE COURT: And am I correct in my understanding that you, after having left the scene of arrest, the

first time you again saw the automobile in question was about 3:00 o'clock that day?

THE WITNESS: Yes, sir.

THE COURT: Very well.

BY MR. EPSTEIN:

Q Now, as far as conducting the arrest, you and Officer Drescher were the only officers actually involved in making and in maintaining the arrest, is that correct?

A Yes, sir.

Q So that your prime responsibility with respect to the two defendants and transporting them to the precinct, is that correct?

A Yes, sir.

Q Now, you saw the automobile again at around 3:00 o'clock in the afternoon?

A Yes.

Q And did the crane operator come into you with any kind of slip?

A Yes, he came into, he walked into the precinct, [fol. 38] and he wanted to know who was the officer that requested the impounding of the '53 Ford, that he had it out back. I told him that I was handling the case, and I signed his crane slip.

Q Which means that you are in receipt of the automobile?

A That is correct.

Q All right. Now, did there come a time when you went out to the automobile again?

A Yes. At this time the crane operator informed me that he had put it on the back impounding lot near the bushes, and that it was raining outside and he hadn't had a chance to close the windows, because he didn't want to disturb any possible chance of fingerprints or get involved in the case. I told him that I would take care of raising the windows, because I was going to put a property tag on the vehicle.

Q Now, what exactly is a property tag?

A It is an identification tag with my name and the owner of the vehicle, the tag number, and the property book, and so forth. It is all the information re-

lating to the ownership of the vehicle and why it is impounded by the District Police.

Q Now, are there any other regulations or procedures that are followed in impounding an automobile? [fol. 39] A That is correct. We are required to take and close the vehicle. In cold weather we are required to check the antifreeze, and also we are required by law to search the vehicle and remove all valuables from the vehicle when it is impounded.

THE COURT: What law do you refer to, Officer?

THE WITNESS: The District impounding laws.

THE COURT: You are referring to statutes as distinguished from regulations of the Metropolitan Police Department?

THE WITNESS: It is a regulation that we are governed by.

BY MR. EPSTEIN:

Q And what is done with the property that is taken from the automobile, the valuables and property taken from an automobile? What is the procedure then followed?

A It is placed on the property book at the precinct. The property itself is forwarded to the Chief Property Clerk of the Metropolitan Police Department with a property return.

Q All right. And did you then go outside to the automobile?

A I did.

Q And was it raining?

A Yes, it was drizzling.

Q And what did you do once you arrived at the [fol. 40] automobile?

A I first went to the rear door on the passenger side and opened the door and closed the window and secured that door. I then opened the passenger side to the front of the vehicle; and at this time while I was rolling the window up I observed a registration card belonging to the complainant in the robbery case, Mr. Paul Herring, lying in the window well, the door jamb, on the floor, in full view.

Q Now, by window well, could you be more specific in describing the relationship?

A When the door is open, there is a metal strip on the floor; and it is approximately, it is sort of perforated and raised to prevent leakage into the car; and this registration card was laying face up right in this door jamb.

Q This is where in older cars the running board might have started out, right at the edge of the door on the bottom?

A It is under the door. When the door closes, the door closes over top of it.

Q Right. And this is where you saw the card facing with the name of the complainant in this case?

A Yes, sir.

Q All right. And what procedure did you then follow?

[fol. 41] A Oh, I went into the precinct and brought the defendant out to the car and pointed out this bit of evidence to him and asked him did he have any knowledge of it.

Q And what, if anything, did he say?

A He stated he did not know how it got there, and he had never seen it before.

Q And what procedure did you then follow with respect to this card or the car?

A I took this piece of registration card and placed it on the property book, all the information, and put it in an envelope and forwarded it to the Chief Property Clerk, Metropolitan Police Department.

Q And did there come a time when you filed an affidavit for a search warrant at the District of Columbia Court of General Sessions?

A Yes, sir.

MR. EPSTEIN: May I have this marked as a Government's exhibit?

THE DEPUTY CLERK: Government's Exhibit No. 1 marked for identification.

(The affidavit was marked Government's Exhibit No. 1 for Identification.)

MR. WEINSTEIN: May I see it, please? Would you indulge me for just a moment?

[fol. 42] THE COURT: Yes, certainly.

MR. WEINSTEIN: No objection to the affidavit.

BY MR. EPSTEIN:

Q I show you Government's Exhibit No. 1 for Identification which is an affidavit for a search warrant. Can you identify that?

A Yes. It has my signature, and this is the affidavit that I filed.

MR. EPSTEIN: I ask that it be introduced as Government's Exhibit No. 1 in evidence.

THE COURT: There being no objection, it will be received.

(Government's Exhibit No. 1 for Identification was received in evidence and marked Government's Exhibit No. 1.)

THE COURT: Would you pass it up or were you going to use it?

MR. EPSTEIN: No, I am sorry.

THE COURT: Indulge me just a moment, please. Very well, Mr. Epstein.

BY MR. EPSTEIN:

Q Officer Baker, pursuant to this affidavit, did you go and get a search warrant issued by the District of Columbia Court of General Sessions?

A Yes, sir.

[fol. 43] Q And did you execute the search warrant?

A Yes, sir.

Q And against whom was it executed?

A The Property Clerk of the Metropolitan Police Department.

Q And did you seize from him a registration card?

A Yes, I did.

Q And then what did you do with the card after you seized it?

A It was filed as evidence in this case.

MR. EPSTEIN: I have no further questions at this time.

CROSS EXAMINATION

BY MR. WEINSTEIN:

Q Did you say that Officer Drescher was with you at the time you arrested Mr. Hines?

A Yes, sir.

Q Where were you and Officer Drescher at approximately 1:30 p. m. on August the 30th in relation now to Mr. Hines and Mr. Harris' automobile?

A In about the 2400 block of M Street.

Q About a block away?

A In the middle of the next block.

Q Now, did you observe—tell us what you observed [fol. 44] when you saw the two defendants come out of the premises in the 2500 block? What did you and Officer Drescher do?

A I observed the two defendants talking shortly; and the defendant entered his Ford, Harris entered his Ford; and the defendant Hines got into a Cadillac. At this time we drove up. I observed Harris had an open can of beer in the car.

Q Which side of the cruiser were you on?

A Which side of the cruiser was I on? I don't recall whether I was driving or not that day.

Q Do you recall whether or not it was you that went to Mr. Harris' car or was it Officer Drescher?

A I went and took Harris out of the front seat of his car, and Drescher went and got Mr. Hines.

Q Now, did you open Mr. Harris' door?

A I don't recall whether I opened it or whether he got out himself.

Q Is it not possible that he was standing at the door ready to get in his car when you drove up?

A No, he had entered his vehicle.

Q Did you identify yourself as a police officer at this time?

A Yes.

Q Did you ask him to get out of his car?

[fol. 45] A. I asked him first for his identification and ownership papers of the vehicle.

Q Did he produce these?

A Yes, he did.

Q Did there come a time when you asked him to get out of his car?

A Yes.

Q Did he get out of his car?

A Yes.

Q Shut the door?

A Yes.

Q You then were standing in the street?

A Yes.

Q Did you search him?

A Before he got into the cruiser, we searched him.

Q All right. Do you know whether Officer Drescher got into Mr. Harris' automobile?

A I don't think so.

Q Is it possible that he got into the car?

A It is possible.

Q Now, you called for the crane at approximately what time?

A Shortly after the arrest, after 1:30.

Q Would you say five or ten minutes?

[fol. 46] A Possibly.

Q How long did it take you to drive to No. 6?

A About ten minutes.

Q Do you know what time you arrived at No. 6?

A Approximately 1:45.

Q And did you then interrogate the two defendants?

A On the way to No. 6 and at No. 6 I interrogated them.

Q How long did your interrogation last?

A Very briefly, maybe five minutes or so.

Q What time did you book the two defendants?

A I don't recall what time they were placed on the arrest book.

Q Do you know what time the crane arrived?

A About 3:00 p. m.

Q Was that approximately an hour and a half after you placed them under arrest?

A That is correct.

Q Now, where were the cars parked on M Street?

A They were parked on the north side approximately in front of 2517 M Street.

Q Were they parked in violation of any traffic regulation?

A No, sir.

[fol. 47] Q Just sitting there and they were lawfully parked at that time?

A Yes, sir.

Q Was Officer Drescher there when the crane brought the car into the precinct?

A No, sir. He accompanied me back to No. 6 Precinct in the cruiser.

Q He had left?

A Yes, sir.

Q Was he there during any of the interrogation?

A Yes, sir.

Q When did he leave?

A When did Officer Drescher leave?

Q Uh huh.

A He was there during just about the whole case.

Q Now, let me ask you this—

MR. EPSTEIN: I think, Your Honor, that the witness misunderstood one of Mr. Weinstein's questions as to when the crane was brought back. Would you repeat that question?

MR. WEINSTEIN: I asked him what time the crane arrived, and I think he said approximately 3:00 o'clock.

THE WITNESS: At No. 6 Precinct?

BY MR. WEINSTEIN:

Q Yes.

[fol. 48] A Yes, approximately 3:00 o'clock.

Q Now, at that time Mr. Harris and Mr. Hines were being booked in the police station, is that correct?

A Yes, sir.

Q They were no where near the automobile?

A No, sir.

Q Now, would you tell us what you did when the man who was operating the crane arrived at the precinct?

A First, I signed his crane slip, indicating that I was the officer that was handling the case.

Q Was the crane then in the custody of the Police Department?

A Yes.

Q I don't mean the crane, I mean the automobile?

A Yes, sir.

Q It was in the custody of the Police Department at that time?

A Yes, sir.

Q All right. Was it in the custody of the Police Department at 1:30 p. m. when you placed the two defendants under arrest and put them into the cruiser?

A Yes, it was.

Q It was under the custody of the Police Department. No one else could get to this automobile other than you or [fol. 49] other police officers, is that correct?

A I couldn't say that.

Q Well—

A It was parked on the street at the 2500 block of M Street until the crane arrived and picked it up.

Q Did you lock the car at that point?

A No, I didn't.

Q You left it open?

A Yes, sir.

Q Is that normal procedure, to leave a car on the street?

MR. EPSTEIN: I object to the question, Your Honor.

THE COURT: I will overrule the objection.

BY MR. WEINSTEIN:

Q Would you tell us if that is normal procedure, to leave the car that you were impounding on the street unlocked?

A There is no set procedure.

Q Why was it so important to make sure that the windows are rolled up and the car is locked when you get it to the police station and not when you impound the car on the street?

A Well, when it is at the police station and so forth, we remove all valuables. It is just a routine procedure to [fol. 50] lock the car up and indicate it on the impounding sheet.

Q Let me ask you this question. If the car was left open at the scene of the arrest, would you have been responsible if someone had taken something out of this automobile from the time you arrested this defendant until the time—

MR. EPSTEIN: I object to that question, Your Honor.

THE COURT: I think the question would be proper since the witness's view of this matter may have relevance to one or more of the issues on this motion.

MR. EPSTEIN: But, Your Honor, his legal responsibility is a matter to be determined by—

THE COURT: I know. I will determine all questions of law, but I think it may be relevant to find out what the witness's understanding or view of the matter was, and I will let him answer for that purpose.

MR. WEINSTEIN: Would you read the question to him?

THE COURT: Gentlemen, I will say that the purpose for which a particular act may have been done or omitted may be relevant to the motion before me. I am not letting the witness answer this question to elicit his view of the legal matter which I may be called upon to decide; but the view that he entertained, his own mental atti- [fol. 51] tude toward a particular thing may be relevant in connection with this motion. So I will let him answer for that purpose. I guess you better repeat the question.

MR. WEINSTEIN: I was going to ask the Reporter if he would read it to him. I don't remember exactly how I phrased it.

(The Reporter read the last question: "Let me ask you this question. If the car was left open at the scene of the arrest, would you have been responsible if someone had taken something out of this automobile from the time you arrested this defendant until the time—")

THE COURT: Suppose you reframe the question.

BY MR. WEINSTEIN:

Q Now, Officer, I understand that you left the car in the 2500 block of M Street Northwest and called for a crane. You left the car unlocked. The windows were down, I presume. If someone had taken something from this vehicle from the time that you placed the defendant Harris under arrest until the time the crane picked the car up and took it to the precinct, would you have been responsible for anything that was missing from this car, you or the Police Department?

A If it could be proved that we were negligent, I imagine the Police Department would be responsible.

[fol. 52] Q You have stated that you did leave the car open so that if something had have been missing then you would have been negligent?

A But the wagon was on the scene, and so forth. I don't know how long they watched the car. I don't know if they stayed there until the crane got there or not, but the wagon was advised to respond to 2517 M Street and assist the crane when they arrived on the scene.

* * * *

[fol. 57]

* * * *

FRANCIS E. BAKER, JR.,

resumed the witness stand.

THE DEPUTY MARSHAL: You are still under oath, Detective Baker.

THE COURT: You may proceed, Mr. Weinstein.

[fol. 58] BY MR. WEINSTEIN:

Q Officer Baker, I believe you testified that you searched this automobile at approximately 3:10 or 3:12 p. m. on the afternoon of August 30th. Would you say that that was the correct time?

A Yes, sir.

Q And did you have a warrant at that time to search his automobile?

A No, I did not.

Q Subsequent to that, did you prepare an affidavit for a search warrant?

A Yes.

Q Could you give me the date?

A It was Monday morning, the following Monday morning. It would be the 31st, I imagine.

Q Would it be on the warrant?

THE COURT: I didn't see it on there.

MR. WEINSTEIN: It is not on there.

BY MR. WEINSTEIN:

Q Would you have anything in your records to indicate the date?

A It was the same day that it came up in court, Monday morning, which would be August 31st. It was in General Sessions Court.

[fol. 59] MR. WEINSTEIN: I have no further questions of Officer Baker.

THE COURT: Mr. Epstein.

REDIRECT EXAMINATION

BY MR. EPSTEIN:

Q Did Officer Drescher return with you to the precinct after the defendants were arrested?

A Yes, sir.

Q He did not remain behind at the scene?

A No, he did not.

Q Now, was he at the precinct when the crane returned with the automobile?

A Yes, he was.

Q All right. And to the best of your knowledge, did you see Officer Drescher at any time go into the automobile and conduct any kind of search at the scene?

A I don't recall seeing Officer Drescher searching the car.

Q All right. Now, when you left the scene, when you and Officer Drescher and the defendants left the scene, was any other police officer present at the scene?

A There were two other officers in a unit from No. 3 Precinct were on the scene; and we advised them that the car would be impounded and would they respond.

[fol. 60] down to the scene when the crane got there and assist the crane operator with the impounding.

Q Now, is it required procedure that police officers be present?

A Yes, because we have had a lot of incidents where crane operators have been assaulted and so forth when they go to impound a car. So it is normal procedure to always have a police unit on the scene to assist them and to protect them.

Q And there was such a police unit there at the time you left the scene of the car?

A I can't say for sure.

Q I say when you left.

A When I left the scene, yes, there was a unit from No. 3 Precinct on the scene.

Q Now, Mr. Weinstein asked if you searched the car at the precinct. Did you go out from the precinct to conduct a search of the car or were you going out to the car for some other reason?

A I was going out to the car to put an impounding sticker on the car, the property tag, and also to close the windows and to take any property out of the car which might be valuable belonging to the defendant.

Q And this was with a view towards safeguarding [fol. 61] that property?

A That is correct.

Q You were not going out there to conduct any kind of search of that property?

A No, sir.

BY THE COURT:

Q How are you going to see whether the car has property in it, Officer, unless you search the car?

A We take all property that is in view, such as clothing and articles of any nature that is in the car in view and glove compartment and so forth, and it is merely taken out for safeguarding.

Q Why wasn't that done when the car was up on M Street before it was left?

A There was no property in the car, except a can of beer that was open.

THE COURT: Very well.
MR. EPSTEIN: I have no further questions.

RECROSS EXAMINATION

BY MR. WEINSTEIN:

Q How do you know there was no property in the car at M Street if you didn't conduct a search at that time?
A While on M Street there, we did look in the car [fol. 62] and look around and make sure there was no weapon in the car.
Q Then someone did look in the vehicle?
A Yes.
Q Someone did search the vehicle on M Street?
A There was no thorough search made of the vehicle. It was observations were made.

BY THE COURT:

Q Exactly what was done? I am speaking about M Street now.
A When the defendant got out from behind the wheel of the car, I vaguely remember looking in the vehicle while the door was open; and I believe I might have reached under the seat, and so forth, checking for a gun.

BY MR. WEINSTEIN:

Q Did you open up the glove compartment?
A I don't recall whether I opened the glove compartment or not at that time.
Q Was the trunk opened?
A No, it was not.
Q And let me ask you this. The defendant Harris was on the driver's side of the automobile, is that correct?
A Behind the wheel.
[fol. 63] Q And the door was open when he got out and it remained open while you looked inside?
A Yes, sir.
Q And at that time you didn't see any registration card on the floor?

A No. The registration card was on the passenger side.

BY THE COURT:

Q Was it a two door or four door?

A It was a four door, and it was on the passenger side, the right side of the vehicle.

Q When you say the passenger side, the right side, it was, as I understand, under the right front door, is that correct?

A Yes, sir.

THE COURT: Very well.

BY MR. WEINSTEIN:

Q Now, you cannot state whether or not these officers were present at the time the crane arrived, can you?

A No, I cannot.

Q And you don't know what time the crane arrived to tow the car away, do you?

A No, I do not.

Q So that it is possible that the car was vacant [fol. 64] there on the street—

MR. EPSTEIN: I object, Your Honor. Anything is possible, and that is not the proper kind of question.

THE COURT: This is your witness. I will permit the question, and I will overrule the objection.

THE WITNESS: Yes, it is possible.

MR. WEINSTEIN: I have nothing further.

THE COURT: Very well.

BY THE COURT:

Q Officer Baker, I understand that before you even saw Mr. Harris you spotted this car and recognized this car from the description and from the license plates even before you saw Mr. Harris on August the 30th, is that correct?

A Yes, sir.

Q How long was it that Mr. Harris appeared and entered the car after you first observed the car parked on M Street?

A A matter of a few minutes.

Q Did anyone enter the car, that is, get inside the car during any portion of the period between the time you first saw it and the time that Mr. Harris got in the car?

A No, sir. We sat about almost a block away in the next block and merely watched the car.

Q I see. Now, the car was parked in such position [fol. 65] that it was headed in what direction?

A Headed west bound on M Street.

Q Would the car then have been parked on the same side of M Street on which fronted the building that Mr. Harris left? Maybe my question is not too clear. What I am trying to find out is, When Mr. Harris came out of the building in the 2500 block M Street in which he was, did he have to cross the street to reach the car?

A No, sir.

Q Or was the car already parked on that side of M Street?

A It was parked on the north side of M Street. The building he came out was right in front of the car.

Q Very well. Now, he was in the car at the time you first communicated anything to him, is that correct, seated behind the driver's seat?

A That is correct.

Q How did he get into the car?

A He talked to the defendant Hines shortly, and then he walked around to the street, opened the driver's side, and got behind the wheel.

Q Entering from the street side rather than the sidewalk side?

A That is correct.

[fol. 66] Q At any time in your view, when I say in your view I mean, according to what you may or may not have seen on M Street—let me reframe it and make it a bit clearer. From the time you first spotted this vehicle parked on M Street until you left the place at which you arrested Mr. Harris, did you see anyone enter the car or leave the car through the right-hand front door?

A No, sir.

Q What is the custom and practice of the Metropolitan Police Department relative to conducting searches of vehicles occupied by persons who away from some precinct station are then placed under arrest?

A I don't believe there is any set procedure as far as the Police Department goes. You just have to more or less notify the crane shop as soon as possible and have the car brought to the precinct. In some precincts in the District, we impound the vehicles and leave them parked on the street. We do not have impounding lots. So, therefore, sometimes we have to leave the cars parked on the street; but, generally, we have an obligation to bring the car into the precinct; and if we have the space available, we will put it on the lot and secure it and tag it and send the proper papers into the Chief Property Clerk's Office.

[fol. 67] Q What were the weather conditions at approximately 1:30 on August 30th?

A It was a cloudy sort of a day, but it was clear.

Q The windows were down when the car was on M Street?

A Yes, they were.

Q Do you know whether or not the windows were down and, more specifically, the window in the right front door was down when you first observed the car parked on M Street?

A I really don't recall. I know it was down when it was at the precinct, because I opened that door to roll the window up on the passenger side.

Q Was that your sole reason for opening the door?

A Yes, sir.

THE COURT: Anything further, gentlemen?

MR. EPSTEIN: Not from this witness, Your Honor.

THE COURT: Counsel?

BY MR. WEINSTEIN:

Q Officer Baker, did you look in the glove compartment at the precinct to see whether there were any valuables in it?

A Yes.

Q Did you look in the trunk?

A Yes, we opened the trunk.

Q Did you look under the seats?

A Yes.

Q Did you take the seats out?

[fol. 68] A Not at that time.

Q Did you do this by yourself?

A Yes.

Q No one accompanied you?

A No, sir.

Q Now, I ask you this question, was there any reason for your impounding this vehicle?

A Yes.

Q What was that reason?

A This vehicle was identified on teletype as the vehicle used in the robbery yoke job, and we impounded it as evidence.

Q What I mean, was there any reason for taking the vehicle? You could have locked the car right then and there on the street without having it towed into the precinct. You testified a few seconds ago that you don't always take these cars into the station but sometimes you just lock them and leave them on the street.

A In front of the precinct they have specific areas, like No. 10 Precinct has a street where they impound all their vehicles and they park them on the street and put tags on them and lock them up. But in our case we always impound them and bring them to the Sixth Precinct.

Q Even though the car is taken in the No. 7 Precinct [fol. 69] which is on the other side of town?

A Well, if the case is going to be handled at No. 6 Precinct, and so forth, we will bring it to No. 6 Precinct; and then we will present the facts to the U. S. Attorney's Office and let him decide whether it is released or whether it is to remain in custody.

Q MR. WEINSTEIN: I don't think I have anything further.

BY THE COURT:

Q I gather from your testimony that the lot upon which the automobile is impounded, in other words, when it had been towed down to No. 6 Precinct and placed

in the lot, is a lot that is used exclusively by No. 6 for this particular purpose?

A That is correct.

Q In other words, you just store impounded vehicles on the lot?

A That is correct; and when there is available space, we also park our own vehicles back there.

Q I see. Tell me something about this lot. What is it, just an open area, is it enclosed to any extent, Officer, does it have a fence around it, how accessible is it to members of the public?

A It is enclosed by fence on two sides with two [fol. 70] driveways on each side of the precinct going into it, and there is about a four foot hedge on the third side. And the precinct itself faces on the lot. So it is very easily accessible to the public.

Q Let me go back. You have fences on two sides?

A Yes, sir.

Q A hedge on the third side, and the precinct building itself on the fourth side?

A Yes, sir.

Q The lot is accessible through either of two driveways, is that correct?

A Two driveways and the hedge.

Q Now, you correct me if I am mistaken in this, but I recall your testimony to have been that when the car was towed in it was placed on what you refer to as the back part of the lot near some bushes, is that correct?

A Yes, sir.

Q Would you elucidate upon that briefly, if you will?

A This would be the east side of the parking lot where the hedge runs the whole length of that lot. The hedge is between the Brightwood School and the Sixth Precinct; and this car was backed in by the crane and placed alongside these hedges.

[fol. 71] Q Now, I understand that it was your purpose when you went up on the lot to place the property tag on this vehicle and also to ascertain whether from mere observation there might be valuables in the interior of the car with a view to your collecting those articles and turning those over to the Property Clerk

purely and simply for safekeeping for Mr. Harris, is that correct?

A That is correct.

Q However, I also understand that there was also a search of the car at some time or another involving the glove compartment and the trunk, and I am not so sure as to what the situation was with reference to the seats, because your answer to a question eliciting that information was that the seats were not removed at that time.

A They were removed when the search warrant was issued by the judge.

Q I see. Very well. Now, when are these other parts of the vehicle searched in the fashion to which you have testified, before or after the issuance of the search warrant?

A The glove compartment?

Q I am speaking about the glove compartment, the trunk, and other portions of the interior.

A The glove compartment and the trunk and the [fol. 72] interior of the car is the area that we always search on a vehicle. It is required that we search the trunk. If necessary, and we do not have a key to the trunk, the policy is to take and pull the back seat out and go in through the back wall of the car, because in a lot of cases we have had complaints later where property is missing from the trunk, which we had no knowledge was in the trunk, because we did not have a key and we did not want to force the lock and damage the car.

So, therefore, it is the policy to search the trunk, the glove compartment, and the interior of the car.

Q When you say you are required to do that, you mean you are required by regulations of the Metropolitan Police Department?

A Yes, sir.

Q Is the person whose vehicle it is consulted or advised with reference to the proposed search of the vehicle for this purpose?

A No, sir.

Q Was any information given to Mr. Harris in this case of any purpose or any design on the part of the

Metropolitan Police Department to conduct a search of this vehicle?

A No, it was not.

[fol. 73] Q Did you make any statement to Mr. Harris after the car had been towed into No. 6 to the effect that you were going out to take another look at the vehicle? Did you make any such statement to Mr. Harris?

A Yes, I told Mr. Harris that we had impounded his car and that we were going to keep it and that he would have to see the United States Attorney as to when it would be released to him, because we were using it as evidence in the case. And at that time I filled out a property tag and went out to the car and placed a property tag on the steering wheel.

Q But did you tell him at this time that either then or at a later time a search or an examination of the car, including the glove compartment and the trunk, would be made by the police?

A No, sir.

Q As I understand, the sole purpose of the regulation requiring this examination of vehicles to be made is a desire to secure whatever valuable items of personal property may be contained in the vehicle?

A That is correct.

THE COURT: Anything further, gentlemen?

MR. EPSTEIN: Just one or two questions.

FURTHER REDIRECT EXAMINATION

BY MR. EPSTEIN:

[fol. 74] Q This further examination of the automobile with respect to any valuables was made after you saw the card on, after you opened the door of the front right side and saw the registration card, then you made a further examination of the vehicle, is that correct?

A Well—

Q In time sequence, which came first?

A The first thing I did when I walked out to the car was I tied the property tag on to the wheel. At this time I noticed the back window was open on the other side.

I went around and opened the back door and rolled that window up and closed the back door. Then I went to the passenger side and rolled that window up when I opened the door, and that is when I saw the card.

Q How much time elapsed until you made any further examination of the automobile as far as valuables were concerned?

A Well, at that time I looked into the glove compartment to see if there was any property in the glove compartment and checked the car over briefly for valuables, and so forth, and then went in and got the complainant and brought him right out—I brought the defendant out.

THE COURT: How about the trunk, did you check the trunk before the defendant was brought out?

[fol. 75] THE WITNESS: Yes, I did.

BY MR. EPSTEIN:

Q On M Street, when the door was opened and the defendant was removed from the car, you also testified that you looked around in the car briefly?

A Yes, sir.

Q And for what purpose were you making that examination?

A Weapons.

Q And did you uncover any weapons?

A No, I did not.

MR. EPSTEIN: Thank you. No further questions.

FURTHER RECROSS EXAMINATION

BY MR. WEINSTEIN:

Q I understood you in reply to a question from the Judge that you conducted a search of this vehicle after that day you impounded the automobile. This affidavit which you got was for a search of the Property Clerk, is that correct?

A That is right.

Q And under that guise, did you also search this vehicle?

A I believe the search and seizure warrant specifies to the Chief Property Clerk contents taken out of this [fol. 76] vehicle that is impounded by No. 6 Precinct.

Q I believe you told the Judge that you conducted a further search of the automobile after you secured this warrant?

A That is correct.

Q So that in effect you were searching this car without a warrant even after you had secured a warrant to search the Property Clerk, whatever the Property Clerk had in his possession, is that correct?

A That is correct.

THE COURT: Why did you have to make another search if on August 30th after you spotted the registration card you then, Officer, looked in the glove compartment and went in the trunk and, as I understand, otherwise examined the interior of the vehicle? Why was a further search necessary?

THE WITNESS: After finding this proceeds of crime, I suspected that the wallet might have been stuck up in the springs of the seat or under the dashboard or possibly hidden in such a manner in the car that it might be still in the car. I did not find anything in the search.

MR. WEINSTEIN: Your Honor, I want to clear my own mind of something.

BY MR. WEINSTEIN:

Q Officer, when you arrested the defendant on M [fol. 77] Street, let me understand this, you opened the car to search for weapons, you looked under the seats, you opened up the glove compartment—

A No, I did not open the glove compartment.

Q You did not open up the glove compartment, but you looked under the seats?

A I think I reached under the seat on the driver's side.

Q Did you look in the back?

A I looked into the back.

Q At that time you saw nothing?

A No, sir.

Q And when you got the car to the station, you don't recollect stating in front of both defendants that you were going back out and search the automobile, you don't recollect making that statement?

A It is possible I might have said that. I don't remember it.

Q And at this time you went out and you took certain things out of the automobile and locked it up?

A I took the registration card out. That is all.

Q That was all?

A I believe that was all.

Q There was nothing else of value in the automobile, [fol. 78] any clothing or anything?

A I don't recall offhand.

Q Is it a fact that there was a jacket and a hat in the back seat?

A I don't recall that.

BY THE COURT:

Q As I understand, Officer Baker, after you opened the door, that is, the right front door, you saw the registration card lying there, you returned inside the precinct, got Mr. Harris, brought him back before you removed the card?

A That is correct.

Q Still lying in there?

A Yes, sir.

Q You questioned him at this time as to the card that you had seen there?

A Yes, sir.

BY MR. WEINSTEIN:

Q Do I understand you now to say that you did not pick the card up and take it into the station and show it to Mr. Harris?

A That is correct. It remained in the car.

BY THE COURT:

Q With the door open or closed while you were gone?

A I don't recall whether I shut the door at that [fol. 79] time. It is possible that the door might have

remained open, because the car had had a wet spot on it where the rain had landed on it.

Q Was it still raining at that time?

A At 3:00 o'clock it started sprinkling.

Q I mean, at the time that you left, went back in the precinct station to get Mr. Harris to come back?

A That is correct. It was raining when I brought him out.

BY MR. WEINSTEIN:

Q Who accompanied you when you took him back outside?

A Detective Drescher and Mr. Harris and I believe that was all.

Q Where was Mr. Hines?

A I don't recall.

BY THE COURT:

Q What was the purpose of fetching Mr. Harris to look at the card?

A I wanted to bring it to his attention, if he had any knowledge where the card came from, how it got in his vehicle.

THE COURT: Anything further, gentlemen?

MR. EPSTEIN: Not from this witness, Your Honor. [fol. 80] I would like to call Officer Drescher.

THE COURT: Very well. You may step down, Officer Baker. Is there any reason to hold Officer Baker here any longer? I would like to excuse him unless you gentlemen are going to need him.

MR. WEINSTEIN: Nothing further.

THE COURT: Very well. You are excused at this time, Officer, that is, for purposes of this motion. I don't know whether you are going to be a witness in the main trial or not. In the event that you are, your presence here at 10:00 o'clock on next Monday morning will be required.

Very well.

(Witness excused.)

Thereupon,

ROBERT H. DRESCHER

was called as a witness for the Government and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EPSTEIN:

Q Would you please state your name, rank, and duty assignment?

A Robert H. Drescher, assigned to Sixth Precinct.

[fol. 81] Q And how long have you been a member of the Metropolitan Police Department?

A Five years.

Q Now, directing your attention to August 30th, 1964, did there come a time when you saw the defendants Harris and Hines?

A Yes, sir.

Q And do you recall where that was?

A 2509 block of M Street, Northwest.

Q And can you identify them here in the courtroom?

A Yes, sir.

Q Would you point them out, please, the defendant Harris?

A The gentleman on the end of the table there. (indicating).

Q And the defendant Hines?

A The gentleman in the yellow shirt.

MR. EPSTEIN: May the record indicate the defendants have been identified?

THE COURT: Very well.

BY MR. EPSTEIN:

Q Did there come a time when you were in the company of Officer Baker?

A Yes, sir.

[fol. 82] Q And did you arrest one or both of these men?

A Yes, sir.

Q Which one did you arrest?

A Mr. Hines.

Q And where was he at the time you arrested him?
A He was entering his car in front of 2517 M Street, Northwest.
Q And did you see the defendant Harris arrested?
A Yes, sir.
Q And by whom was he arrested?
A Private Baker.
Q And did you at any time see Private Baker enter the automobile and conduct a search?
A Not while we were on M Street I didn't see him enter the car.
Q And did you at any time while you were on M Street enter the car and conduct a search of the automobile?
A Not Mr. Harris's car, no, sir.
Q And your attention wasn't focused at all times on Officer Baker, is that correct?
A No, sir.
Q You were more concerned with maintaining your arrest of the defendant Hines?
A Correct.
[fol. 83] Q And did you then return with them to the precinct?
A That is correct.
MR. EPSTEIN: I have no further questions.

CROSS EXAMINATION

BY MR. WEINSTEIN:

Q What time did you arrive in the vicinity of 2500 M Street?
A Approximately 1:20, 1:25, we were in the 2400 block of M Street.
Q Let me ask you this question. Did you discuss any of this case with Officer Baker before you testified here today?
A Yes, sir.
Q You have discussed it?
A Yes, sir.
Q Did you discuss it with him this morning, since he testified here this morning?

A Yes, sir.
Q You have discussed it?
A Yes, sir.
Q Did he tell you what he testified here this morning?
A No, sir.
Q What did you discuss with him? Could you give us [fol. 84] the nature of your conversation?
A More or less in the general times of these different occurrences.
Q Did you discuss what each of you did on that particular day?
A No, sir.
Q Now, Officer, where were you seated in the cruiser?
A On the passenger side, front seat.
Q And who did you stop first, which of the defendants?
A Myself, I stopped Mr. Hines.
Q And where was Mr. Hines in relation to Mr. Harris?
A His car was parked in front of Mr. Harris's, approximately twenty feet in front of his car.
Q How long did you have him under observation before you placed him under arrest?
A We had Mr. Harris's car under observation for about ten minutes; and when they came out of a building there in the 2500 block of M Street, it was a matter of fifteen or twenty seconds while they had a slight conversation there and then they both attempted to get into their cars.
Q You say attempted to get into their cars?
A Mr. Harris did get into his car; Mr. Hines, I don't [fol. 85] believe he got into his car.
Q What did you do in relation to the defendant Hines?
A I placed him under arrest for robbery and searched him.
Q Did you then take him over to where Officer Baker was with Mr. Harris?
A I took him past Mr. Harris's car to our cruiser which was parked in the back of Mr. Harris's car.
Q And what did you do then?
A I placed him in the back seat.

Q Did you leave him there and come back and have a conversation with Officer Baker?

A I do not recall.

Q Did there come a time when you opened up the right-hand door of Mr. Harris's car?

A No, sir.

Q You never opened the door of the car and looked into it?

A Not there on M Street, no, sir.

Q Now, what time did you depart the scene after you placed him under arrest?

A About five minutes afterwards.

Q Would this be approximately 1:30?

[fol. 86] A The approximate time of arrest was about 1:30. We left there about 1:35, approximately.

Q And were you driving at that time or were you the passenger?

A I was the passenger.

Q How long did it take you to get from there to No. 6 Precinct?

A About ten minutes.

Q How far is that?

A I would say three or four miles.

Q You could make it in ten minutes?

A Well, it was Sunday afternoon and the traffic was not too heavy.

Q You arrived at the precinct at approximately 1:45?

A Approximately.

Q And what did you do with the two defendants at that point?

A We took them to the detective squad room, No. 6 Precinct, placed a phone call to Private Morda, and he responded and held a lineup; and Private Morda identified Mr. Hines.

Q I am trying to get the time. I am not interested in what Private Morda did. How long did this interroga-

[fol. 87] tion last until you booked them downstairs?

MR. EPSTEIN: Your Honor, I object to this question. Again I don't see the relevance of it. If he wants to determine some particular time period.

MR. WEINSTEIN: I will rephrase the question.

BY MR. WEINSTEIN:

Q From the time you brought him into the squad room until the time you booked him, how much time elapsed?

A Approximately ten to fifteen minutes.

Q So that you are saying that you booked the defendants at approximately 2:10?

A Approximately.

Q Do you know what time the crane arrived at the automobile?

A About 3:00 p. m.

Q Where were you at this time?

A In the squad room.

Q Where were the two defendants?

A In the squad room.

Q They were still in the squad room?

A Yes, sir.

Q Were you present when the driver of the crane came in?

A Yes, sir.

[fol. 88] Q What did he say?

A I don't recall.

Q Do you recall whether he was talking to you or to Officer Baker?

A His conversation was with Private Baker.

Q And you don't recollect what the crane operator said?

A No, sir.

Q Did you recollect Officer Baker saying anything to the crane operator?

A No, I don't, sir.

Q Do you recollect Officer Baker going out and looking through the automobile?

A Yes, sir.

Q Did you accompany him?

A Not the first time he went out.

Q Did he tell the defendant that the car was here and he was going out and search the automobile?

A I don't know.

Q You don't know?

A I don't know.

Q Were you standing there?
A I was in the squad room when the crane arrived.
Q Who else was in the squad room besides you?
[fol. 89] A The two defendants and Officer Baker; and that is all I remember.
Q Now, when you were on M Street, did you call for the crane to come and impound the automobile?
A I don't recall whether we called over the air or by telephone.
Q Were you there when the crane arrived?
A No, sir.
Q You had already departed the scene?
A Yes, sir.
Q Do you know whether anyone was there when the crane arrived?
A A police unit from No. 3 Precinct was standing by the automobile.
Q Do you know whether that unit was there when the crane arrived?
A No, sir.
Q Did you search Mr. Hines' car?
A No, sir.
Q You didn't look in it at all?
A I looked in it, but not a very thorough search.
Q Did there come a time when you accompanied the defendant outside to the car?
A Mr. Harris, yes, sir.
[fol. 90] Q You went with him?
A Yes, sir.
Q Who else was present?
A Private Baker.
Q And what happened at this time?
A He was confronted with the registration card that Private Baker had found in his automobile.
Q You mean Officer Baker showed him a registration card?
A Yes, sir.
Q And what was his response?
A He denied having any knowledge of this registration card.
Q Did Officer Baker have this card in his possession?

A Yes, sir.

MR. WEINSTEIN: I have no further questions, Your Honor.

BY THE COURT:

Q You said Officer Baker had the card in his possession. At what point are you referring to?

A The original time he went out to search the car. I believe he brought the registration back into the precinct.

Q Are you sure about that?

[fol. 91] A I am not sure, Your Honor.

Q Was any statement made to you prior to the time that you left the precinct building with Officer Baker and Mr. Harris to go back out and take another look at the car?

A I didn't hear you.

Q Well, I understand from the testimony, Officer Drescher, that Officer Baker went out alone and then he returned, and then subsequently he, Mr. Harris, and you yourself returned to the automobile.

A Correct.

Q Just before the three of you returned, was any statement made to you? Was, for example, any requests made of you that you accompany him back out to the vehicle? Was anything said? What prompted you to go back out to the vehicle with Officer Baker and Mr. Harris?

A Private Baker stated he wanted to show me something that he had found in the car, and he asked Mr. Harris to come with him back to the car. I don't recall whether Private Baker had the registration card in his possession or whether he left it in the car.

Q Do you have any recollection after the three of you left the precinct building and went back out on the lot of seeing the registration card in the car at any time yourself?

[fol. 92] A Yes, sir.

Q Where in the car was it when you saw it?

A On the right-hand side of the car in the passenger's part where the door closes, the strip that the door closes over, the registration was there.

Q Am I correct in understanding that this position then would be immediately beneath the bottom of the right front door if that door were closed?

A Correct.

THE COURT: All right.

BY MR. WEINSTEIN:

Q Now, do I understand you correctly in saying that when Officer Baker brought this card into the precinct and showed it to Mr. Harris and said, "I found this in the car," and then he went back outside to show Mr. Harris where he found it?

A I don't recall whether he brought the card into the station or whether he left it there. He said he wanted to show me something that he had found in the car.

THE COURT: Anything further, Mr. Epstein?

REDIRECT EXAMINATION

BY MR. EPSTEIN:

Q He stated that he wanted to show you something [fol. 93] that he found in the car, and then you and the defendant Harris went out to the car, and he showed you what he had found in the car?

A Correct.

Q Was that the sequence of events?

A Yes, sir.

MR. WEINSTEIN: Your Honor, I object. He said he doesn't know. He already testified he does not know whether it is or not. There is a conflict here, Your Honor. He has testified that he doesn't recollect whether it was there or whether Officer Baker brought the card in.

THE COURT: I think the easiest way, counsel, to resolve it would be to ask him.

BY MR. EPSTEIN:

Q When is your first recollection of seeing the card?

A Underneath the door jamb in the car.

Q And you do not recall seeing the card at any time before then in the precinct?

A The card?
Q The card.
THE COURT: The registration card.
THE WITNESS: I don't recall seeing it in the station.

[fol. 94] BY THE COURT:

Q Well, Officer, frankly, you are not certain as to whether you first saw the card in the automobile or you first saw it in the precinct station, isn't that correct?
A Correct.
Q You just don't remember whether Officer Baker brought the card in the precinct station or not, but you seem to be firmer in your recollection that you at some time at least did see that card under the right—in other words, in the space that would be immediately under the right front door?
A Yes, sir.
Q Is that a fair appraisal of your testimony?
A Yes, sir.

BY MR. EPSTEIN:

Q And do you also recall Officer Baker coming in and saying that he wanted you to come out and see something that he had found in the car, is that correct?
A That is correct.
Q And it was at that time that you and the defendant Harris went out to the car?
A Correct.
MR. EPSTEIN: Thank you.

RECROSS EXAMINATION

[fol. 95] BY MR. WEINSTEIN:

Q I would like to ask you this question. Was a search conducted of the car at that time? Did you take out the seats and look in the glove compartment, sir?
A I didn't myself, no, sir.
Q Do you know whether Officers Baker did?
A Not in my presence, no, sir.

Q Now, what was your purpose in taking Mr. Harris back outside to the car?

A I had no purpose whatsoever there. Officer Baker asked us to go back out to the car.

Q You didn't take Mr. Hines with you, did you?

A No, sir.

Q Can you tell us why?

A No, sir.

Q Did you ever subsequent to this time search this automobile?

A Mr. Harris's car?

Q Yes.

A No, sir.

Q Can you tell us approximately how long after you were at the precinct with Mr. Harris did you take him outside and show him this card?

A Approximately twenty, twenty-five minutes. That is [fol. 96] a rough guess.

Q You had only been at the precinct twenty, twenty-five minutes?

A This was after the crane had brought the car back. I change that and make it a half hour, forty-five minutes. I just don't recall.

Q If I told you that the crane arrived there with the car at three o'clock, would you say that would be correct?

A Approximately, yes, sir.

WEINSTEIN: I don't think I have anything further.

THE COURT: Anything further, Mr. Epstein?

MR. EPSTEIN: I have nothing further.

THE COURT: Very well, Officer. You may step down.

(Witness excused.)

THE COURT: Are there any further witnesses?

MR. WEINSTEIN: I want to call Mr. Hines back to the stand.

THE COURT: How long is this going to take, counsel?

MR. WEINSTEIN: This will be very short. I am going to ask him two questions.

[fol. 97] Thereupon,

JERRY ANTHONY HINES, one of the defendants, was recalled as a witness for the defendant Harris, and, having been previously sworn, was examined and testified as follows:

THE DEPUTY MARSHAL: You are still under oath.

DIRECT EXAMINATION

BY MR. WEINSTEIN:

Q Mr. Hines, you have heard the testimony here. Did there come a time when you were being booked at No. 6 Precinct in the presence of Mr. Harris that Officer Baker came into the precinct with a card and showed it to Mr. Harris?

A Yes. We were standing up by the window; and he came in there, he said, "Here," he said, "I got you now."

Q He showed him a card?

A He showed him something. I don't know whether it was a card or what it was. He showed him a piece of paper.

Q Do you ever recollect them taking Mr. Harris out to the automobile?

A After he came in, then he took him out, him and the other officer.

MR. WEINSTEIN: I have nothing else, Your Honor.

THE COURT: Mr. Epstein.

[fol. 98] CROSS EXAMINATION

BY MR. EPSTEIN:

Q Was your car impounded?

A No, it wasn't.

Q When you got out on bond some time subsequently, how long were you in jail at that time?

A About four days.

MR. WEINSTEIN: Objection, Your Honor. That is outside the scope of this examination.

THE COURT: What are you driving at, Mr. Epstein?

MR. EPSTEIN: I want to show the reasonableness of the police behavior here, that the automobile that Mr. Hines was in, that there was no action taken with respect to it. It was not impounded.

THE COURT: How is that going to help us in determining the reasonableness of any searching activities that might involve the Harris car?

MR. EPSTEIN: The reasonableness of their overall behavior with respect to the automobiles is relevant.

THE COURT: I don't think it is going to help me. I will let you ask the question, but, frankly, I don't think it is going to help me on this.

Is there anything further, gentlemen?

MR. WEINSTEIN: Nothing further.

[fol. 99] THE COURT: You may step down, Mr. Hines.

(The witness resumed his seat at the counsel table.)

THE COURT: This concludes the presentation of the testimony, as I understand.

MR. EPSTEIN: Yes, Your Honor.

THE COURT: Counsel, I will recess this case until 1:45 on Friday afternoon. At this time I will hear the arguments of counsel. I will afford each side thirty minutes within which to present oral arguments on this motion.

* * * *

[fol. 133]

* * * *

COLLOQUY BETWEEN COURT AND COUNSEL

MR. EPSTEIN: Your Honor, I would request of the Court that the Government be allowed to put Officer Baker back on the stand. I have not spoken to Officer testified on the stand, but I feel that there are certain ambiguities in the record with reference to what he did. At certain points he responds one way, which is a good response to that particular question, but doesn't clarify the

points under discussion. At another point he responds in another way; and I fear that since that matter wasn't gone into on questioning by the Court or cross examination by counsel that the question itself might have been ambiguous so that the Officer's response to that might have just compounded the ambiguity. So with reference to just these few questions, if we could call Officer Baker back right now, we could completely clarify the point and proceed with argument.

THE COURT: All right. Would it be helpful if we [fol. 134] went down the line on the facts to see whether or not there is any disagreement as to not what the facts are but rather what his testimony was before he is recalled? And then it seems to me if anybody has any disagreement at all in this regard, I think it would be helpful.

A rereading of the transcript was very helpful to me, but I am certainly inclined to agree with Mr. Epstein that his testimony does have some ambiguity at certain points. If you think well of the suggestion, I will undertake to do so. I will need the assistance of counsel, I am sure, to recall all of the relevant facts; but I will undertake to state to counsel what my understanding of his testimony to the present time is.

MR. WEINSTEIN: I think that would be helpful, Your Honor.

THE COURT: I think the starting point would be 7:30 a. m. on the morning of August 30th. At the time Officer Baker reported for duty, he received information describing an automobile which allegedly was involved in a robbery on the night before. This description of the automobile also included the license tag numbers of the vehicle. As I have said before, this automobile allegedly was involved in a robbery committed at approximately 11:45 p. m. on August the 29th.

[fol. 135] Officer Baker then checked this information, and this check disclosed that the defendant Harris was the owner of this automobile and that Mr. Harris resided in the 2500 block on M Street, Northwest.

Officer Baker, accompanied by Officer Drescher, then went to the 2500 block of M Street, Northwest. They

parked; and when they got there, they saw a vehicle which answered the description and which bore the tag numbers that Officer Baker had previously been furnished. They held the vehicle under observation for at least several minutes, being then within a block of the vehicle. This vehicle was parked in close proximity to a building out of which the defendant Harris some minutes later emerged. Mr. Harris came out, took a seat in the vehicle behind the steering wheel having entered the vehicle through the left front door; and he was seated there when Officer Baker went up to him and required him to identify himself and also to produce, the testimony doesn't show exactly what it was, something which established his ownership of the vehicle.

Mr. Harris was then placed under arrest. There was a search of his person before he was subsequently placed in a police cruiser to be escorted down to Precinct No. 6.

It appears that there was some observation of the interior of the car; in other words, one or more of two [fol. 136] police officers did look inside the car; and as I was about to say, it appears that there may have been some amount of searching of the vehicle. The testimony on this score is not very clear. But the Officer did testify that there may have been, that he reached under the seat or he looked under the seat; but the Court is very much impressed by this testimony that there was no thorough search of the vehicle, that at this time there was no entry into the glove compartment, no entry into the trunk.

In the meanwhile, Officer Drescher had arrested Mr. Hines, the co-defendant, who was then in or was entering another motor vehicle that was parked fairly close to the vehicle owned by Mr. Harris. And before I leave the 2500 block on M Street, they, it seems to me, are the facts, they are the important facts.

Is there anything that I have said that counsel don't agree with as to what happened over there? Because I am now about to go over to Precinct No. 6.

MR. WEINSTEIN: I was just checking on that search at the 2500 block of M Street. My recollection was that he looked into the car and that he checked

under the seats for weapons, I believe. I think Your Honor is correct, I think he said he didn't remember whether he had opened the glove compartment at that point.

[fol. 137] THE COURT: Well, you might check it, Mr. Weinstein. If there is any question about it, we can ask Officer Baker. I thought he was rather sure that he did not enter the glove compartment at this time.

MR. EPSTEIN: He states on page 43 of the transcript, Your Honor, that he did not open the glove compartment.

MR. WEINSTEIN: On page 27 he says, "While on M Street we did look into the car and look around and make sure there was no weapon in the car."

THE COURT: Yes.

MR. WEINSTEIN: I asked him, and he said there was no thorough search. He said observations were made. That was my recollection, that he wasn't sure whether or not he had opened the glove compartment.

THE COURT: Well, if either counsel desires, since we will have Officer Baker back on the stand, you might inquire as to whether he did examine the glove compartment on M Street.

MR. EPSTEIN: May I, Your Honor, quote from page 42 of the transcript where Mr. Weinstein asked:

"Officer, when you arrested the defendant on M Street, let me understand this, you opened the car to search for weapons, you looked under the seats, you opened up the glove compartment—"

[fol. 138] And the Officer replied: "No, I did not open the glove compartment."

And then Mr. Weinstein asked: "You did not open up the glove compartment, but you looked under the seats?

And the Officer replied: "I think I reached under the seat on the driver's side."

THE COURT: All right, gentlemen. I am finished as to summarizing the facts on M Street. I am about to get down to Precinct No. 6. This commences about 1:30 p. m. on August the 30th. The two defendants were then taken to precinct station No. 6. For whatever

it may be worth, the Officer did testify that there was some questioning of the defendants for a period of a few minutes while they were being moved from the one to the other location.

While they are at Precinct No. 6, about 3:00 o'clock p. m., or almost an hour and a half after Mr. Harris had been arrested, the crane operator—I neglected to mention that after the defendant Harris was arrested his car was impounded, and arrangements were made at the scene on M Street for the car to be towed in. There was then present a wagon. There is some question as to whether or not the police officers remained with Mr. Harris's automobile from the time he was taken from the 2500 block of M Street until the tow truck arrived, [fol. 139] although the testimony is that that is normal routine because of past difficulties that have arisen out of the circumstance that the car has been left unattended.

At approximately 3:00 o'clock, p. m., the crane operator arrived at Precinct No. 6 with the automobile. He told Officer Baker that he had placed the automobile on the back of an impounding lot, which is adjacent to the precinct building. He called his attention to the fact that it was raining, that he had not had a chance to raise the windows in the car, as I understand from Officer Baker's testimony, partly because he didn't want to disturb any fingerprints that might be in the vehicle.

In any event, very shortly thereafter Officer Baker left the precinct building, went out to the car on the lot, and his testimony is that he went out for the purpose of putting a property tag on the car, for the purpose of closing the car up, and for the purpose of removing from the car any article of value that might be observed in the vehicle. You gentlemen might want to clarify this, but I understand Officer Baker's testimony, while a bit confusing, there is a question in there that led me to think that when he was talking about removing articles from the car, he was talking about removing only those which would be in full view. He went out to the lot. He placed a property tag on the [fol. 140] steering wheel. It was raining at this time, and he noticed that not all of the windows in the automobile were up. Just how many windows may have been

open at this time is not clear from the evidence. But he referred first to having closed the window in the rear door on the passenger side. Here again, gentlemen, I am not entirely clear, but I think he is talking about the left rear door, because at one point in his testimony he says he walked around to get to the other door beneath which the registration card was found. But be that as it may, he opened one door, which was not the right front door, he raised the window, and he tells us that he secured that door after he closed the window. I assume that this means that he locked that particular door. And then noticing that the window in the right front door was not entirely up, he went around, and in response to a question that I think I asked him, his testimony was that he went there solely, and opened that door solely for the purpose of lifting or raising the window. His testimony is that he opened the door, he raised the window, and then he saw lying in the well immediately beneath the door, in other words, in the door jamb, in such position that were the door closed it would have been immediately over it, a registration card bearing the name of the complaining witness in this case. He says it was there, and with the door open, [fol. 141] it was then in full view.

Now, gentlemen, and this is what concerned us a great deal on Friday, I am now clear that subsequent to the discovery of this card there were two searches of the automobile. One, I understand, was made immediately after the discovery of the card. When I say searches, let me make a delineation. After the Officer discovered the card, he looked in the glove compartment, he looked in the interior of the car, and he also looked into the trunk. He then returned to the precinct station, leaving the card where it was, and there is some question from his testimony whether he closed the door or he left the door open beneath which the card was found. He returned to the automobile moments later with Officer Drescher and Mr. Harris and there confronted Mr. Harris with the card which was still lying in the door jamb. Mr. Harris denied any knowledge as to how the card may have gotten there.

The card was then taken by the police officer, by Officer Baker, over to the property clerk and subsequently was obtained from the property clerk pursuant to a search warrant obtained later which was directed to the property clerk.

Now, I also understand that after the search warrant was issued, there was still another search of the [fol. 142] vehicle. The explanation given us was that it was felt that perhaps some other property taken from the complaining witness might be found beneath the springs of the seat or elsewhere on the interior of the car and he made the examination for that purpose. Nothing else was found so far as his testimony would indicate.

Now, gentlemen, that is about the size of it. Mr. Epstein, have I said anything with which the Government does not agree?

MR. EPSTEIN: The only point, Your Honor, is that with regard to when the first, he characterized it as, search occurred the question arose on redirect examination by the Government, and that is the only time I can find it, the question was, "How much time elapsed until you made any further examination of the automobile as far as valuables were concerned?" And the Officer apparently in response to that question gave testimony as Your Honor has recounted. I wonder only if the question was sufficiently clear of ambiguity so the Officer was responding as Your Honor now recalls. It would appear to indicate that this search of the remainder of the car occurred before the defendant was brought out. But that is the ambiguity that I raise. I don't know if it is the Government's question that might have done it, but that is the only point that I would choose to [fol. 143] ask the Officer about again. I do not know what his answer will be.

THE COURT: I will let you do it. I am giving my appraisal of the evidence as it now stands. However, this, gentlemen, was something that concerned us all on Friday. And the fact that he went into the glove compartment and went into the trunk between the time he saw the registration card and the time the defendant

was brought out from the precinct station out to where the automobile was, that fact became clear to me, frankly, gentlemen, only after I read the transcript. I wasn't that clear when he finished testifying on Wednesday of last week.

MR. EPSTEIN: Well, Your Honor, I would acknowledge as—

THE COURT: You understand, Mr. Epstein, and I will say this to all counsel, I am just giving you my appraisal of the evidence as it now stands. I made it plain when we were here last week that I would permit either side to recall Officer Baker for further testimony to clarify any aspects of his testimony. So I will let you do that.

MR. WEINSTEIN: We have one correction, Your Honor. On page 10 of the transcript in response to your impression that he said that his only purpose in going out [fol. 144] and removing articles which he—

THE COURT: Didn't I ask him the question? It seems to me I asked a question as to what was your purpose or was it your only purpose or did you have anything else in mind when you opened the door?

MR. WEINSTEIN: This is a question by Mr. Epstein:

"Now, are there any other regulations or procedures that are followed in impounding an automobile?

"Answer. That is correct. We are required to take and close the vehicle. In cold weather we are required to check the antifreeze, and also we are required by law to search the vehicle and remove all valuables from the vehicle when it is impounded."

Now, I don't think there is any testimony, now, this is my recollection, that he said that his only purpose was to remove articles that he could see without doing something else, either opening a door or removing a seat or opening a glove compartment. That was my only question.

THE COURT: Look at pages 26 to 27 of the transcript and page 35. I have those pages in my notes.

MR. CRICKENBERGER: I think the point that Mr. Weinstein is trying to emphasize, Your Honor, is that it is standard procedure to remove valuable articles from

the glove compartment as well as those which are in full [fol. 145] view.

MR. WEINSTEIN: Yes. I was only directing my point to the fact that he was not limiting himself to removing the articles which he could see. For example, if he would have opened the glove compartment and found something of value, he would have removed it.

THE COURT: If you will look at the transcript you will find that there was a little ambiguity, because one place he said something about looking on the inside of the car from observation, and then he mentioned the glove compartment in the same breath. And then in another part I thought he was fairly clear. It seems to me I may have asked a question at this point; but, in any event, that it was only that which he might have seen without having to open the trunk or open the glove compartment. Perhaps, gentlemen, this is just another one of the areas in which it might be desirable to clarify his testimony in this regard.

MR. WEINSTEIN: Your Honor asked him this question.

"Now, Mr. Weinstein asked you if you searched the car at the precinct. Did you go out from the precinct to conduct a search of the car or were you going out to the car for some other reason?

"Answer. I was going out to the car to put an impounding sticker on the car, the property tag, and also to [fol. 146] close the windows and to take any property out of the car which might be valuable belonging to the defendant.

"Question. And this was with a view towards safeguarding that property?

"That is correct."

THE COURT: What page are you reading from now?

MR. WEINSTEIN: 26 and 27, Your Honor.

THE COURT: 26 and 27. Look over at 37. You might get something that might be just a shade different.

MR. WEINSTEIN: Your Honor, here on page 27—

THE COURT: If you want to get it clarified, let us get it clarified. The witness is here and he needs only be asked.

MR. CRICKENBERGER: There is one other point before the witness comes in, Your Honor.

THE COURT: I am going to take a recess before we get on this.

MR. WEINSTEIN: Could I just finish this last question? This is a question by the Court on page 27:

"How are you going to see whether the car has property in it, Officer, unless you search the car?

"We take all property that is in view, such as clothing and articles of any nature that is in the car in view and glove compartment and so forth, and it is merely [fol. 147] taken out for safeguarding."

THE COURT: That is where the reference was made to the glove compartment. This is page 27?

MR. WEINSTEIN: Yes, Your Honor.

MR. EPSTEIN: The witness is outside, Your Honor. We could bring him in and clarify this.

THE COURT: We have gone beyond the point at which we normally take a brief recess. I am going to take one at this point. Immediately upon the conclusion of the recess, we will pick up with Officer Baker.

Do you have anything further?

MR. CRICKENBERGER: Before we recess, Your Honor, Mr. Epstein had some question about the testimony on page 40, I believe, where Officer Baker said that he searched the glove compartment and the rest of the car right after seeing the card, that he was thinking, perhaps, that this was ambiguous in point of time. But on page 24 Officer Baker testified that he searched the car without a warrant at approximately 3:10 p. m., which is the time that he went out from the station.

THE COURT: He didn't say that. He was asked a question as to whether or not he conducted one about 3:10 or 3:12 p. m., wasn't he?

MR. CRICKENBERGER: But he said that is correct. [fol. 148] THE COURT: What I am saying is that there might be a difference between a witness saying, "Yes, I did this about 3:10 or 3:12," and his simply answering the question, "Did you make a search of the car about such and such a time?" But however it goes, gentlemen, I have tried to make plain to counsel that I

will give you reasonable freedom in this regard to ask questions.

MR. CRICKENBERGER: That question that appeared on page 24 is the same type of question that will be asked of Officer Baker when he comes in now.

THE COURT: The only thing that disturbs me, Mr. Crickenberger, is your expression, type of question. If you mean the same subject matter, yes. I don't know how counsel propose to propound their questions.

MR. CRICKENBERGER: It seems to me, Your Honor, that you are giving less credence to an answer elicited on cross examination than if the witness had explained it in his own words.

THE COURT: No. I did a fair amount of examination myself to try to keep my mind clarified as we went down, and I am certainly not disregarding the answers that he gave to the Court's questions. I didn't mean to imply that. If you will look at the question, I looked at [fol. 149] it, because it appears fairly early in the transcript, and it isn't until later on that Officer Baker makes it plain to me that it was between the discovery of the card and the time at which Mr. Harris was taken back to the car that he went into the glove compartment and went into the trunk. There is a question, but I thought that the times that were involved in this connection were stated in the question and not stated in the answer; and sometimes when you put time in a question, "Didn't you put your hat on today at about 3:10 p. m.?" After all, we are dealing with a lay witness on the stand. He may have put his hat on and he put it on today, but the time he put it on may have been 3:20 instead of 3:10. So, consequently, the importance of 3:10 might get a little lost. But we will clear that up, Mr. Crickenberger. You or Mr. Weinstein or Mr. Epstein may ask the question. If you gentlemen don't ask the question, I am probably going to ask the question anyway. I expect before I rule on this motion to have all of these facts very, very clear in so far as the Officer's testimony goes.

MR. CRICKENBERGER: If the Court will indulge me a moment more, Your Honor, may I now ascertain if it is the view of the Court that on M Street we had a search of some sort, perhaps a cursory search; and

when we went to the precinct, we had another search [fol. 150] which included the trunk and the glove compartment and under the seat but not removing the seat?

THE COURT: That is right.

MR. CRICKENBERGER: Immediately after locating the registration card?

THE COURT: After the card was found and before the defendant was brought out.

MR. CRICKENBERGER: Then on the following day, on Monday after a search warrant was procured, we had another search of the automobile which included removing the seat.

THE COURT: Apparently so, yes.

MR. CRICKENBERGER: But the search warrant was obtained on the property clerk, and at no time was there a search warrant obtained for searching the automobile.

THE COURT: That is my understanding, yes. I agree with you entirely. That is my understanding of the Officer's testimony. Frankly, gentlemen, these would be the facts on which I would conclude, unless his further examination would necessitate a change; in other words, subject to the reservation that I might be persuaded to the contrary, depending on what he might say here this morning. That is the way I understand the circumstances to have been.

At this point, Marshal, the Court will stand in recess for fifteen minutes.

(Short recess.)

[fol. 151] Thereupon,

FRANCIS EUGENE BAKER, JR.,

was recalled as a witness for the Government and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EPSTEIN:

Q Officer Baker, directing your attention to August 30th, 1964, do you recall being at the precinct, No. 6 Precinct on that day?

A Yes, sir.

Q And then directing your attention to the afternoon of that day, did there come a time when you returned to the precinct with the defendants Harris and Hines?

A Yes.

Q And did there come a time when the crane operator came in and asked you to receipt for an automobile?

A Yes.

Q And then did you go out to the automobile?

A I did.

Q And while in the process of rolling up the passenger side front door window, did there come a time when you saw a registration certificate for an automobile belonging to the complainant in this case?

A Yes, sir.

[fol. 152] Q Now, immediately after that, Officer, what did you do? What was your immediate next step?

A I went into the precinct and brought out the defendant Harris and Detective Drescher.

Q Now, Officer, was there anything else you did before going back into the precinct after seeing the registration card?

A No. I don't recall whether I shut the door or left it open. I went right into the precinct and brought the defendant out and asked him, pointed out to the registration card and asked him did he know where that came from.

Q All right. Now, Officer, did there come a time when the defendant was taken back into the precinct?

A Yes, sir. After the defendant stated he did not know where it came from, I picked the registration card up carefully and took it into the precinct and put it on the property book and forwarded it to the chief property clerk's office.

Q Now, with reference to the automobile, was there any effort made by you to conduct an inventory search that afternoon?

A Yes, sir.

Q And when was that?

[fol. 153] A That was during the time that Harris had come outside there, while we were talking, and I asked him about the registration card.

Q Was Harris outside at the automobile at the time the inventory search was conducted?

A During part of it.

Q And the remainder of it—when did you commence the inventory search?

A More so about the time when I first went out to the car. I went over and put the property tag on the vehicle and made a survey of the inside, the glove compartment, and the inside of the vehicle, and so forth; and then started rolling the windows up because it had started to rain. And it was about that time that I was doing part of the inventory search.

Q So, in other words, the inventory search was commenced as you were rolling up the windows?

A Yes, sir.

Q To the car?

A Yes, sir.

MR. EPSTEIN: I have no further questions.

MR. WEINSTEIN: I just have several questions.

THE COURT: Very well.

[fol. 154] CROSS EXAMINATION

BY MR. WEINSTEIN:

Q Officer Baker, did you open the door—I believe you testified that you found the car under the right-hand door, passenger side?

A That is correct, in the weatherstripping in the floor of the car.

Q Now, would you clarify this point? You opened the door of the car?

A Yes, sir.

Q And at that time in what you call the weather-stripping, you saw the card?

A It was laying right in the well of the weather-stripping.

Q Now, is that a portion that you couldn't see unless you opened up the door?

A That is right. The door had to be opened; and while I was leaning over rolling the windows up, I was looking down; and that is when I observed it.

Q But you did open the door?
A Yes, sir.
MR. WEINSTEIN: I think he has clarified the other points, Your Honor.
THE COURT: You can ask any questions that you [fol. 155] might have.

BY MR. WEINSTEIN:

Q You don't recollect picking the card up first and then going into the precinct and showing it to Officer Drescher and Mr. Harris and then taking them back to the car and showing them where you found it in the car?
A No, sir.
Q This couldn't have happened?
A I doubt it.
Q Let me ask you this question. Could it have happened that you had picked up the card and shown it to Officer Drescher who was in the precinct and then put it back and brought Harris out?
A No, because I went directly into the precinct, and I remember I was pretty excited about seeing the card there; and I called Drescher and the defendant Harris and brought them outside and pointed out to them, because I distinctly remember tsking the card out very carefully while the complainant was there; and it had rainspots on it.
Q I am just going to read your testimony now that was taken last week, and just tell me whether or not it is correct. The question was, I think it was asked to you by the Court, "Did you make any statement to Mr. Harris after the car had been towed into No. 6 to [fol. 156] the effect that you were going out to take another look at the vehicle? Did you make any such statement to Mr. Harris?
"Answer. Yes. I told Mr. Harris that we had impounded his car and that we were going to keep it and that he would have to see the United States Attorney as to when it would be released to him, because we were using it as evidence in the case. And at that time I filled out a property tag and went out to the car and placed the property tag on the steering wheel.

"Question. But did you tell him at this time that either then or at a later time a search or an examination of the car, including the glove compartment and the trunk, would be made by the police?

"Answer. No, sir.

"Question. As I understand, the sole purpose of the regulation requiring this examination of vehicles to be made is a desire to secure whatever valuable items of personal property may be contained in the vehicle?

"Answer. That is correct."

And over on the next page, in response to a question, I believe, by Mr. Epstein:

"How much time elapsed until you made"—I better go back.

MR. EPSTEIN: Your Honor, I object to this type [fol. 157] of questioning. I am not quite sure what the question that is being asked of the Officer is or if Mr. Weinstein is merely rereading some testimony for some purpose that he has in mind.

MR. WEINSTEIN: I am just trying to make sure that this is correct, Your Honor, the testimony which he gave.

MR. EPSTEIN: I think it would be more appropriate if he did it in part.

THE COURT: Could you do it in part reading?

MR. WEINSTEIN: Yes, sir.

BY MR. WEINSTEIN:

Q I will ask you this question, then. At the time you went out to roll the windows up, I believe that you just testified that during this period of time you were conduoting your inventory search, you opened up the glove compartment, you looked in the trunk for valuables, yes—would you read me the question back?

(The Reporter read the last question.)

BY MR. WEINSTEIN:

Q And you noticed this car on the floor, is that a correct statement?

A That is right. When I opened the door up to roll the window up, I noticed the card.

Q And it is at this point you went into the station [fol. 158] and got Mr. Harris and Officer Drescher?
A That is right.
MR. WEINSTEIN: No further questions.
THE COURT: Mr. Epstein.

REDIRECT EXAMINATION

BY MR. EPSTEIN:

Q Officer, at what point did you look into the glove compartment or the trunk of the automobile?
A I looked into the trunk—
MR. WEINSTEIN: I object, Your Honor, I think he has just clarified that question.
THE COURT: I will overrule the objection.
May I ask counsel to come to the bench just a moment?

(AT THE BENCH:)

THE COURT: I was just waiting for counsel to complete the examination of this witness just to state to counsel that I am more confused than ever now; and, frankly, I was just going to tell counsel unless they clarify it on their own questions, I am going to ask him a series of questions myself. And you gentlemen may do it, of course, if you wish. But this is my idea as to what needs to be done. We need to start in the precinct station when the driver of the tow truck comes in to have [fol. 159] this Officer testify one by one, even to the simple events, as to what he did. That is the only way that we are going to satisfactorily get these things in order.

I made a delineation before the witness was placed on the stand as to what I understood his testimony to be. Now, I don't even know what he had in mind when he went out to look at this vehicle. I know what he has said might suggest that what appeared to me rather clearly from his previous testimony is not so, but I am not satisfied with what he has said up to the present time. I have the responsibility of deciding this motion, and these things may be important.

Now, I called you gentlemen up so that I might mention that to you, because when Mr. Epstein asked this question and you objected, I had already decided at this time unless there was some further clarification when counsel got through with their interrogation I was going to ask questions myself; but, of course, I would much prefer that the examination be carried on by counsel instead of the Court.

MR. WEINSTEIN: Your Honor, I was under the impression that we were trying to clear the point up about what he did when he went out to put the property tag on the car.

THE COURT: Yes.

MR. WEINSTEIN: His testimony is now that he [fol. 160] looked in the glove compartment before he opened up the door.

THE COURT: I am not clear about that at all. What I would like to do is to get all the events. Start off in the precict station, take them one by one, just take whatever time it needs, and then we will get them in order. I listened very carefully to two or three answers that he gave to questions. And there was one that Mr. Epstein asked him and he answered; and I am not certain, but I do still understand that when he went out there the first time that what he did was he put the tag on the steering wheel. Now, I had understood from what I thought was rather clear to me on Friday that then he started rolling up the windows; but now I am not certain after he put the tag on the vehicle as to just what he did next. I am not sure as to whether or not he started looking in the glove compartment or he went in the trunk or he searched the inside of the car and then decided to roll the windows up or just what. These are things I want to be certain about.

MR. CRICKENBERGER: Your Honor, what troubles me about this is if we try to ascertain the state of mind of the Officer at that time as to his intent, I think we can go in circles again. At one time it seems to be that he had in mind not making a search, but merely tagging the automobile; and from other testimony, it seems that [fol. 161] he had in mind when he departed from the

interior of the precinct to make a search as part of tagging the automobile. So aren't we really asking for the actions of the Officer to speak for his intent? And we have determined the actions of the Officer to include a search in the automobile as part of the transaction in going out and tagging it.

THE COURT: Well, I don't have any preference as to the order in which these questions will be asked, but I see nothing wrong at some point or another in asking the Officer what his intentions are and also having him describe his actions as well. I don't know how we are ever going to find out what the facts are unless we ask this man, because he was the one who was out there at the critical time.

MR. EPSTEIN: Your Honor, might I suggest that rather than counsel or me doing the questioning that Your Honor do the questioning with reference to clearing this up?

THE COURT: I will do it only if counsel would agree.

MR. EPSTEIN: I would agree, Your Honor.

MR. CRICKENBERGER: Could we reserve the right to cross examine after the Court has elicited the testimony that it wants?

THE COURT: All right, if you gentlemen wish me to. [fol. 162] I have already stated how I am going about it. I hope this doesn't get tedious, but this time I am going to endeavor to make certain not only that we get all the events but that we get them in proper sequence, because the sequence, I think, has become important on this motion.

Very well, gentlemen, I will proceed to do that.

(IN OPEN COURT:)

BY THE COURT:

Q Officer, I have a series of questions that I would like to put to you. I will ask you to listen very carefully to each question that I am about to ask and to answer that question and at least for the time being confine your answers to the questions that are being asked. If you feel that there is anything that is important in this

connection and I do not ask the question, in other words, the question doesn't embrace it, just indicate to me and I will give you an opportunity to fill it in.

I would like to start, Officer Baker, at approximately 3:00 o'clock p. m. on August 30th, 1964, when you and Officer Drescher and Mr. Harris and Mr. Hines are at Precinct No. 6. It is my understanding that it was at approximately this time that the person who operated the truck that towed in the automobile belonging to Mr. Harris arrived at Precinct No. 6, is that correct?

[fol. 163] A Yes, sir.

Q All right. Now, just tell me the first thing that happened when you first saw the driver of the tow truck.

A He asked who was the officer involved in this Ford that was impounded from M Street. At that time I told him that I was handling the case. I signed his crane slip. And at this time he told me that it had started to rain out there and that he hadn't had a chance to roll the windows up, he didn't know whether we wanted to print the car or not. I told him I would take care of it.

Q Very well. Was there any further conversation between this man and yourself?

A No, sir.

Q Was there any conversation with him involving Officer Drescher, Mr. Harris, or Mr. Hines?

A No, sir.

Q Where was Officer Drescher at the time you talked to him?

A I believe Officer Drescher was standing in the detective room right adjacent to the hallway where the crane operator was.

Q Was either Mr. Hines or Mr. Harris or both in your immediate presence at the time you talked to the operator of the tow truck?

[fol. 164] A Not in my immediate presence.

Q How long was it after you held this conversation that you went out to the automobile owned by Mr. Harris which then was on the impoundment lot?

A Within a couple of minutes.

Q Why did you go out, Officer?

A To place a property tag on the vehicle and roll the windows up and lock the vehicle up.

Q Did you have anything else in mind at this time?

A To take all valuables out of the vehicle and put them on the property book if anything was found in the car.

Q To take the valuables out of what part or parts of the vehicle?

A Either the interior, the glove compartment, or the trunk of the vehicle.

Q How were you going to get into the trunk and the glove compartment?

A I had the defendant's keys to his auto.

Q Very well. Now, you left precinct No. 6, that is the precinct building and you went out to the car. What was the first thing you did when you got to the car?

A I put a property tag on the steering wheel.

Q And after you did this, what was the next thing you did?

[fol. 165] A I looked through the car, the interior, and the glove compartment. I walked around to the right rear door, opened that door, and rolled the window up.

Q Now, just a moment. As I understand, what you did was after having placed the property tag on the steering whool, you then made an examination of the interior of the car, including the glove compartment?

A Yes, sir.

Q Describe your examination of the car. Tell me exactly what you did.

A I looked into the rear seat, the rear floor. While I was leaning across the steering wheel, I opened the glove compartment and saw routine things you keep in a glove compartment, and got out of the car and walked arond to the—

Q Just a moment, before you do that. Did you remove the back seat?

A No, I did not.

Q Front seat?

A No, sir.

Q Were there mats of any character on the floor of the vehicle?

A I do not recall.

Q Do you recall whether you looked under these?

[fol. 166] A I do not recall that there was any floor mats on the car, but I don't recall looking under any mats.

Q Did you look into anything else on the inside of the car other than the glove compartment, the ashtrays, for example?

A I believe I looked behind the sun visors, too.

Q I see. All right. And you went into the glove compartment?

A Yes, sir.

Q Did you go into the trunk?

A At that time I didn't go into the trunk.

Q Now, I understand after having done this you walked around to the other side of the car and you opened the right rear door?

A Yes, sir.

Q And raised the window, is that correct?

A Yes, sir.

Q Tell me what you did next?

A Next I went to the right front passenger side, opened that door, and was in the process of rolling the window up.

Q What purpose did you have in mind when you opened the right front door?

A To secure the windows and secure the doors on [fol. 167] that side of the vehicle.

Q When you use the word secure, you mean to lock them?

A Yes, sir.

Q All right. Now, I understand that it was when you opened the right front door that you saw the registration card lying face up on the door jamb?

A Yes, sir.

Q What did you do when you saw this?

A I read the information on the registration card and realized that it belonged to the complainant and that it had been in his wallet at the time of the robbery the prior night. At this time I went into the precinct

and got the defendant Hines—Harris, and Drescher and brought them out to the vehicle.

Q And what did you do then?

A I pointed out the registration—opened the door and pointed out the registration card and asked the defendant did he know where it came from and how it got there and so forth.

Q All right. And what followed that?

A After the defendant denied having any knowledge of it, and so forth, I carefully picked up the registration card by the corners and took it in the precinct and [fol. 168] carefully placed it in an envelope, put it on the property book, and forwarded it to the property clerk's office.

Q Now, where was Mr. Harris at this time?

A He came back into the precinct with Drescher and myself, because it was raining outside.

Q Have you in your testimony in response to my questions here today omitted any act or any event between the time you discovered the registration card and the time you delivered the card to the property clerk as you have just described?

A No, sir, not to the best of my knowledge.

Q How about looking into the trunk of the automobile?

A After I had brought the card back in, I later went out to the car, unlocked the trunk, checked that, and finished securing the car.

Q How much later?

A I really don't know, approximately half an hour or so.

Q Why did you go back a half hour later to look into the trunk?

A To complete my survey. At the time I brought the registration card into the precinct, I also showed it to the defendant Hines and questioned him about it. And it is necessary to place these items on the property book, and so [fol. 169] forth, and it takes a little time to complete this task.

Q As I understand, Officer, after having tagged the car, you went rather carefully through the interior of the car, is that correct?

A Yes, sir.

Q Why didn't you go into the trunk at that time?

A I was in the process of making the search of the interior, and I hadn't got to the trunk. My search was interrupted by this piece of evidence that was lying in the door jamb.

Q Did you make any further inspection of the interior of the car, exclusive of the trunk, after you found the registration card?

A Yes, sir.

Q When was this done?

A The following day after I secured the search and seizure warrant.

Q You didn't make any further examination of the vehicle except for the trunk after you found the registration card? That is, you didn't make any further—let me restate this question.

Did you at any time on August 30th, 1964, after having found the registration card, make an inspection or examination or search of any part of this automobile [fols. 170-178] except the trunk?

[Error by reporter in numbering pages Letter of 6/9/67]

A No, sir.

Q Why didn't you?

A At this time, realizing that I had evidence, proceeds of the crime from a felony, I conferred with the officials in the precinct; and at that time I thought it would be best to see the U. S. Attorney in the morning about obtaining a search and seizure warrant.

Q Why is it that you made a further search on August the 31st?

A I had reason to believe that due to the fact that the complainant's registration card was found in the car that possibly his watch or wallet, which was also taken, might be in the car.

Q But you had already been through the car on the inside on August the 30th before you found the registration card, isn't that correct?

A Yes, sir.

Q Weren't you satisfied with the search that you had already made on August 30th?

A No, sir, it was not a complete, thorough search.

THE COURT: Mr. Epstein, any further questions?

MR EPSTEIN: No, Your Honor.

THE COURT: Mr. Weinstein?

[fol. 179] RECROSS EXAMINATION

BY MR. WEINSTEIN:

Q You testified that you got a search warrant on the 31st day of August?

A Yes, sir.

Q And was that search warrant directed toward the property clerk, the search of the property clerk, what he had in his possession, or was that search warrant directed towards the search of the automobile again?

A I would have to read the search warrant to refresh my memory on that matter.

THE COURT: Is it possible for counsel to stipulate on this? I haven't seen the search warrant. I saw the affidavit, but not the warrant itself.

MR. EPSTEIN: I have not seen the warrant either, Your Honor. I cannot stipulate.

MR. WEINSTEIN: Let me put it this way—

THE COURT: Perhaps during the luncheon recess you gentlemen might take a look at it.

BY MR. WEINSTEIN:

Q Pursuant to this search warrant that you secured, did you not only look through the property which you had turned over to the property clerk but did you also go into the vehicle again?

A Into the trunk, and also finished winding up the [fol. 180] windows on the car and locked the car up. That is about the only thing.

Q What I mean, was this done on the 31st when you had a search warrant?

A No, this was done on the 30th.

Q I am directing myself to the 31st when you secured a search warrant for the property which you had turned

over to the property clerk. You secured a search warrant directed to the property clerk to search and seize certain items which he had in his possession. Did you also pursuant to this search warrant go into the vehicle again?

A Yes.

Q And in what part of the vehicle did you go into? Now, this is on the 31st day of August. What part of the vehicle did you go into on that day?

A The interior, the trunk, the glove compartment again, the whole vehicle, I went over it again. I found nothing.

Q At this time you took out the rear seat?

A Yes, sir.

* * * *

[fol. 181]

* * * *

BY MR. CRICKENBERGER:

Q Officer Baker, you testified a moment ago that after seeing the registration card under the door well of the car that you went back into the precinct building and came out with both of the defendants, the defendants Hines and Harris?

A No.

Q Then who did you come back with?

A Harris and Drescher.

Q You did not bring the defendant Hines with you?

A I don't think so.

Q May I ask, why you did not bring the defendant Hines out?

A Well, at that time the car belonged to Harris, and he said in the precinct that he was the only operator that night of the vehicle. So I brought him out.

Q Let me clarify also for the record what took place at the 2500 block of M Street. You said at that time you did not search the vehicle operated by the defendant Hines, is that correct?

A Hines?

Q Yes.

A His Cadillac?

[fol. 182] Q Yes.
A I did not go near his car.
Q The vehicle was not impounded, is that correct?
A His Cadillac?
Q Yes.
A No, it was not.
Q At no time was his automobile searched?
A I don't know. Detective Drescher might have looked into the car.
Q To your knowledge.
A To my knowledge, it wasn't searched.
MR. WEINSTEIN: I just want to ask a couple of questions.
THE COURT: Very well.

BY MR. WEINSTEIN:

Q Why was Mr. Harris's car impounded and not Mr. Hines.
A Mr. Harris's car was described in the lookout, wanted in connection with the robbery, and so forth, and that is why his car was impounded.
Q Did you consider the vehicle to be evidence?
A Yes, sir.
MR. WEINSTEIN: Nothing further.
THE COURT: Mr. Epstein.

[fol. 183] FURTHER REDIRECT EXAMINATION

BY MR. EPSTEIN:

Q Did you testify that after the defendant Harris went back that he was borught out to see the car and then he went back into the precinct, and did you then on that afternoon return to the car and conduct any further inventory search?
A Yes, sir. After I took and lifted the registration card and took it into the precinct, later, after putting it on the book, and so forth, I went back out to the car and completed my inventory search of the trunk and finished rolling up the windows and secured the vehicle.

Q Now, was that the first time you opened the trunk that afternoon?

A Yes, sir.

Q You hadn't opened the trunk prior to that time?

A No, I hadn't.

Q You didn't open up the trunk the first time you went out?

A No. I went out there with that in mind, but just the glove compartment and the interior of the car. And then my search of the trunk was interrupted when I opened the door and found the registration card.

MR. EPSTEIN: No further questions.

[fol. 184] FURTHER RECROSS EXAMINATION

BY MR. WEINSTEIN:

Q In response to a question Mr. Epstein just asked you you said you had in mind the search?

A I had in mind to take all valuables out of the car. See, it is routine that we have to take and look into the glove compartment and the trunk and the interior and take all property out of the car to assure that everything will be returned to the owner.

Q Did you find anything else other than the card?

A No, I found nothing else of any value.

Q The only other point I want to get in my mind is that the trunk wasn't opened on the car when you went into the station to bring Mr. Harris back?

A No, the trunk was still secured.

Q And after you had taken Mr. Harris back into the station, you then came back and opened up the trunk?

A About a half hour later.

THE COURT: Anything further, gentlemen?

MR. EPSTEIN: No, Your Honor.

BY THE COURT:

Q Officer Baker, you testified that when you went out on the lot after the car had been towed in, the first thing you did was to place a property tag on the steering wheel.

[fol. 185] A Yes, sir.

Q Was it necessary for you to open the left front door in order to do this?

A The driver's side?

Q That is correct.

A Yes, sir. I got in across the seat, across the steering wheel at the same time I was putting the tag on.

Q You have also testified that having done this you inspected the interior of the car and you also looked into the glove compartment?

A Yes, sir.

Q Let me ask you this. When you put the tag on the steering wheel, were you standing outside the vehicle or were you seated inside the car?

A I was more or less in a crouched position with a knee on the seat and an arm on the back of the seat, looking over into the rear of the seat, and so forth.

Q Was it from this position that you made the inspection of the interior of the car, including the glove compartment?

A Yes, sir.

Q Until you had reached the point that you were no longer looking or searching the interior of the car, had you opened any door of the automobile other than the [fol. 186] right front door?

A No, sir, that is the only door.

Q Did you ever have an occasion to open the left rear door for any purpose before you found the card, the left rear door?

A No, sir.

Q Was the window up in the door immediately besides the steering wheel?

A On the driver's side?

Q That is right. This would be the left front door.

A The window was down.

Q Did there ever come a time that you raised that window?

A I don't recall whether I raised that window before I put the property tag on or afterwards while I was getting out of the door. I think I raised that window when I was getting out of the door. It is hard to say.

Q Now, let us go to the left rear door. Was the window in that door up or down when you first went out?

A I do not recall.

Q Did you have any occasion or any reason for opening the right rear door other than to raise the window in that door?

A That was my only reason.

[fol. 187] Q Did you have any occasion to open the right front door other than to get to the mechanism operating the window in that door?

A No other reason.

THE COURT: Mr. Epstein, is there anything further?

MR. EPSTEIN: No, Your Honor.

THE COURT: Mr. Weinstein?

MR. WEINSTEIN: Yes. I save one question.

THE COURT: All right.

BY MR. WEINSTEIN:

Q Where is the glove compartment in relationship to the handle which you rolled the window up on the right-hand side?

A The glove compartment?

Q Yes.

A It is located on the dashboard in front of the vehicle.

Q Well, were you sitting in front of the glove compartment when you opened it to look into it?

A When I opened the right-hand door, I was standing outside the car.

Q When you got into the car to put the property tag on the steering wheel, I think you testified you were sitting in the car.

[fol. 188] A Crouched sideways more or less on the seat with one knee.

Q Is there a button on the glove compartment that you open?

A I don't recall whether it was a button or how I opened it.

Q There was something there to open it?

A Yes.

Q What I want to know is, Where is the handle on the right-hand door to roll the window up in relation to the glove compartment?

A I don't recall.

Q Could you have reached it at this point and rolled up the window?

A Possibly.

Q Did you do it?

A No. I opened the door from the outside.

Q After you got out of the car?

A After I walked around to the back window.

THE COURT: Are you all finished, gentlemen?

MR. WEINSTEIN: Yes, sir.

THE COURT: I will ask you to step down at this time, Officer Baker.

(Witness excused.)

[fol. 189]

* * * *

THE COURT: Gentlemen, I think I should point out before the argument gets under way that the situation from my viewpoint is a bit different since Officer Baker testified this morning. You will recall that I did make a delineation of my understanding of his testimony. I now understand that between the time he left Precinct No. 6 to go out to the vehicle on the lot upon which it was and the time that he discovered the registration card there was something of a search that was made of the vehicle.

Now, I want to be careful at this point to suggest to counsel that that statement does not necessarily mean that this card was found during the course of a search. I would imagine that counsel on both sides will be addressing themselves to that question. But at least Officer Baker has clarified one ambiguity in his original testi-

[fol. 190] mony, that there were some activities involving a search of the vehicle during this particular period. That is something that wasn't clear from the transcript that we had before us this morning before he testified.

Mr. Weinstein.

ARGUMENT BY COUNSEL FOR DEFENDANT HARRIS ON MOTION TO SUPPRESS EVIDENCE

MR. WEINSTEIN: May it please the Court, briefly reviewing the facts of the case, without going into the details of the various searches which I think we have now arrived at, the police officers in this case received some information that a certain robbery took place on Saturday, the 29th of August, and certain information was given to this officer as to an automobile and the tag number.

At approximately 1:30 on Sunday, August the 30th, they spotted the defendant Harris and the defendant Hines in the 2500 block of M Street, Northwest, when they were about to get in their automobiles. The testimony was at about 1:30 the defendant Harris was placed under arrest by Officer Baker; that he was taken out of his automobile at this point and searched and put into a police cruiser.

There is some testimony that there was a search of the vehicle at the point of arrest, that the officer looked into the car, I think he looked under the seats to see whether or not there were any weapons. He found none, placed a call over the radio to the police dispatcher for a crane.

[fol. 191] The police officers then transported the defendants to No. 6 Precinct where they were interrogated. I am not quite sure whether or not they were booked at this time, but they were at the precinct under the custody and under arrest of the Police Department until the time of 3:00 o'clock p. m. when the crane operator arrived at No. 6 Precinct with the vehicle belonging to the defendant Harris.

At that time the car was placed on the police lot, and Officer Baker was notified that the car was there.

The testimony then shows that Officer Baker went out to the car, placed a property tag on the steering wheel. He had gotten into the car to place this property tag on the steering wheel. And he opened up the glove compartment. He looked in the back. He looked under the seats to see whether he could find anything of value. He got out of the car, opened up the left rear door,

rolled up the window, walked around to the right side of the car, being the passenger side. I believe the right rear door was opened first, and he rolled up the window, and then he opened up the right passenger door to roll up the window; and when he did this, he saw a card under the door well, which he testified he looked at and ascertained that this card belonged to the complaining witness in this matter.

He then went into the precinct and got Officer [fol. 192] Drescher and the defendant Harris, bringing them back to the car, showing Mr. Harris this card, and asking him what he knew about it, at which time there was a denial that he knew anything about it. He was taken back into the precinct, the card was removed and put into an envelope and turned over to the property clerk at No. 6, No. 6 Precinct.

The following day he went down and secured a search warrant for the property clerk for this piece of evidence. And at that time he also searched the vehicle again.

Now, it is the position of the defendant Harris that this search of the vehicle at the time it was made was in violation of his constitutional rights under the Fourth Amendment and under the recent case of Preston versus the United States. We contend that the search of this vehicle one and a half hours after the time of arrest was a general and exploratory search of the car and it was an unreasonable search in violation of the defendant's constitutional rights.

THE COURT: I don't think there would be any question but that the Preston case would be drawn very much into the picture if at the time Officer Baker was in the vehicle, looking in the glove compartment, looking under the visors, and otherwise removing something on the inside of the vehicle in order to see what might be [fol. 193] behind it or what might be in it.

But you will recall his testimony here, that after having placed the tag on the steering wheel, having examined the interior of the car, having opened the glove compartment and inspecting the interior of the glove compartment, he gets out of the vehicle, and without going forthwith into the trunk, which appeared to be next

on his list to inspect, he decided that since it was raining it would be a good idea to roll up the windows. So then he proceeds about his business of raising windows and locking doors. And it was when he reached the right front door and opened the door for the purpose only of raising the window and securing the door, he found the registration card.

Now, that is a little different from the situation in Preston, is it not, counsel? Also, let me call your attention to this. In the Preston case, the only connection of the vehicle to the offense causing the arrest of the defendant was the fact that the defendants were simply seated in that vehicle.

MR. WEINSTEIN: Yes, Your Honor.

THE COURT: You must bear in mind the testimony in this case, which is uncontradicted, that this vehicle was impounded by the Metropolitan Police Department with a view to its possible use for evidentiary purposes, [fol. 194] because, from its viewpoint, it was the car which was suspected of having been used in the robbery that occurred on the previous day.

MR. WEINSTEIN: Your Honor pointed out the other day the case of United States versus McDaniel, which case I have gone into in great detail over the weekend, under the theory, as I understand it, that this card was in view of the officer when he opened up the door.

It is my contention, Your Honor, and the contention of the defendant, that the moment the door was opened the search was begun, and that if he had not opened up this door, he would not have seen this card. Therefore, I do not feel that the open view doctrine applies.

Now, in the McDaniel case they cite the case of Farrell versus the Commonwealth at 264 Southwest 1078. This is a case, Your Honor, where an automobile was parked on the side of a road. The police officers were called to investigate this automobile; and as they approached the automobile, the defendant himself opened the car door, allowing the sheriff to view some illegal whiskey which was in the car. The court in its opinion stated:

"If, however, appellant defendant had not opened the door, the sheriff would not have been justified in searching the car without a warrant; for when the appellant opened the door as the officer approached and thus exposed [fol. 195] the kegs in the car, the officer had an opportunity to see the kegs and smell the odor of alcohol."

Now, in this particular situation the Officer testified that he opened the door himself, at which time he saw this card. Now, he commenced this search on the vehicle from the left-hand side of the automobile; and he continued to search, I assume, around to the other side of the automobile, at which time he found this card underneath the door jamb I guess you would call it. I forget the word he used.

THE COURT: Yes, he used the expression door jamb, door well.

MR. WEINSTEIN: Door well, I believe, was the expression he used.

THE COURT: In such position that were the door completely closed—

MR. WEINSTEIN: —he could not see it. And he was not able to see this card without opening up the door.

Now, I draw Your Honor's attention to Adams versus the United States, decided in our Court of Appeals on August the 20th, 1964. In this case, some police officers in the early morning hours ran when a police car came on to the scene. An immediate subsequent search of the area disclosed a robbery of a liquor store, and that was within [fol. 196] one-half hour after their initial encounter the police recognized one of the men, appellant, getting into an automobile parked in a parking lot behind the looted store and arrested him.

Now, the issue in that case was whether or not the police officers had a right to open up the trunk of that car then and there. Our Court of Appeals held that the search of the vehicle at the place of arrest was proper. However, they state in that case that the issue as to admissibility of the evidence found in the trunk was more difficult.

THE COURT: There the Court of Appeals held that the Preston doctrine did not preclude the search of a

trunk all contemporaneously or almost contemporaneously with the arrest of the defendant, even though it was strenuously argued in that case that once the defendant had been taken into custody and the vehicle got under the control of the police it was not necessary that the trunk be then searched. But the court said that no other court had held that the Preston doctrine would preclude a search of the trunk at that time. And I think Judge Bazelon said in the opinion that we are not persuaded that we should be the first court to so hold.

MR. WEINSTEIN: Yes, Your Honor. I bring this [fol. 197] case to your attention to point out that that car there was also involved in a robbery, and the court does say in that case that once the car had been impounded and taken into police custody and under their control that a search at a later time of that vehicle would have been illegal as decided in Preston versus the United States.

THE COURT: Now, where did you find that in the opinion, counsel?

MR. WEINSTEIN: In page 752 of the—it says here:

> "The Government seeks to justify the search of the trunk as an incident to appellant's arrest. Appellant argues that the search without warrant was illegal since the trunk was locked, the car keys were turned over to the police, and hence there was no danger that, after being arrested, he could have used any weapons in the car or could have destroyed any evidence of a crime."

And there he cites Preston.

THE COURT: As a matter of fact, the court is quoting from Preston.

MR. WEINSTEIN: Then he goes on to say:

> "Thus there was no emergency justifying a search without a warrant.
>
> [fol. 198] "Preston did hold that a warrantless car search subsequent to an arrest was illegal, but there the search was not an incident to the arrest." As in our case, the search here was not incident to this

arrest. It occurred some one and one-half hours later. "It occurred at the police station to which both the parties and the car had been brought. Thus the search was too remote in time or place to have been made as incidental to the arrest," and again they are quoting from Preston.

"We recognize here the logic in appellant's argument."

That part there, the last paragraph which Your Honor just quoted states that they were permitted to search the trunk of the vehicle at the time and place of arrest as being incident to the arrest.

Now in this situation we have a car that was used in a robbery which was impounded and taken into police custody, and the car was not searched until one and one-half hours later; and it is our contention that this search was not incident to an arrest which occurred at 1:30 in the afternoon when the search took place at 3:10.

THE COURT: Let me ask a couple of questions. Suppose the Officer had left the precinct building having in mind at that time only to go out and place a property [fol. 199] tag on the steering wheel of the car. Let us suppose that that is all he had in mind. Suppose further he went out to the car; and in order to gain access to the steering wheel in order to fasten the tag there, he opened the left front door and in the door jamb beneath the door he had found this registration card. Under those circumstances, would you feel that the card, having been obtained in that fashion, would be suppressible?

MR. WEINSTEIN: Your Honor, I take the position that once he opened up the door of that vehicle he had begun a search.

THE COURT: Irrespective of his purpose in opening the door?

MR. WEINSTEIN: I don't think his purpose is really relevant. The question I think that we have to answer is whether or not this police regulation can give the police the power to do something to search a vehicle in violation of a defendant's constitutional rights.

THE COURT: In my hypothet I don't have the police security regulation at all; because, as I stated, it was to be assumed that the Officer went there and opened the door only for the purpose of gaining access to the steering wheel so that he could place the property tag on it.

MR. WEINSTEIN: Is this the example you are giving [fol. 200] me?

THE COURT: Yes. You see, I am still calling attention to the fact that when the card was discovered the police officer had opened the door, revealing the card in the door jamb, solely for the purpose, and I say solely, because this question has now been asked Officer Baker twice. I know I asked him the first time, and I think I also asked him the second time.

MR. WEINSTEIN: All right.

THE COURT: But Officer Baker has made it plain in his testimony that the only reason that he opened that right front door, the only occasion for his opening the right front door was to get to the mechanism operating the window in order to close the window to keep the rain from coming into the car.

MR. WEINSTEIN: He had commenced to search from the left-hand side of this vehicle.

THE COURT: He had done some amount of searching inside the car, including opening the glove compartment. That we know, and we may assume that the full view doctrine would not apply to anything in the glove compartment. He also said that he had examined behind the visors, and I think you might safely make the same assumption there. He had done some other amount of searching on the inside of the vehicle. I am not entirely [fol. 201] clear as to just what it involved. At one time he referred to the floorboards; but when I inquired as to whether or not he removed any mats on the floor, he wasn't sure that the car had mats. But at the time this card was discovered, according to his testimony, it came into view when he opened the door solely for the purpose of raising that window.

MR. WEINSTEIN: We take the position, Your Honor, that this was just in furtherance of the search that he had originally begun. There was no break in time from

the point that he got out and just walked around to the other side of the automobile and opened up the car door, at which time he observed this card.

Now, to my knowledge, I don't think motive really plays a part, even though from all the evidence and from the testimony of Officer Baker, I think that we have to conclude that his motive in impounding this automobile from M Street was to inspect this vehicle for some evidence involved in this robbery. Otherwise, there would have been no reason at all to impound this automobile. Mr. Hines' car was also there, and his car was not impounded.

Now, the police officers testified that when they left the scene on M Street the windows were down, and there were no precautions taken, I don't believe, at that time to protect the property of Mr. Harris. They said that [fol. 202] there was a patrol wagon on hand at the time, but they don't know how long they remained. Now, there was a lapse of time from 1:30 until 3:00 o'clock until the automobile was transported to No. 6 Precinct.

Now, he testified that the car was not in violation of any traffic regulation at the time they seized it. Now, they seized this car incident to this arrest for one purpose and one purpose only, to examine this automobile, to find out whether there were any fingerprints or any evidence in the vehicle.

THE COURT: No. The Officer testified, and here again he testified several times, and here again the testimony is uncontroverted, this car was impounded for evidentiary purposes as distinguished for the purpose of being subsequently searched to see whether or not it contained evidence. I would understand Officer Baker's testimony to mean this. You will remember his testimony about having been furnished when he came on duty early this morning the description of the car, including the tag number.

MR. WEINSTEIN: Yes.

THE COURT: And some place in his testimony, I seem to recall, that he felt that the car should be impounded, subject to a later decision to be made by the United States Attorney, for purposes of having it available for [fol. 203] the view of prospective witnesses and their identification of the vehicle.

MR. WEINSTEIN: It is still my contention on behalf of the defendant Harris that at this point the car was in complete custody and control of the Police Department, that no one else could get to the car. I believe I asked that specific question of Officer Baker, and he agreed that the car was under the complete custody and control of the Police Department.

At that point the car should have been placed either in the garage or impounding lot and a search warrant should have been secured through the proper means and methods in order to look into this vehicle to get anything. Anything that was done after the automobile had arrived at the precinct one and one-half hours later, any view, I don't say an open view, but here he opened up the door; and once he opened up the door he began a search, regardless of what his motives were, whether or not he was complying with a police regulation or not, and any search at that point was an exploratory search, it was an unreasonable search, and it was in violation of the defendant's constitutional rights; and any evidence that he found as a result of this should be suppressed.

If Your Honor will recall, there is another case of Smith versus the United States in which a stolen automo- [fol. 204] bile and the defendant's automobile were seized incident to an arrest. The two cars were taken to a gas station. This is 335 Fed 2d 270, and it is on page—

THE COURT: Yes, I have read it, counsel.

MR. WEINSTEIN: The car was taken to a gas station, at which time some few days later, some time later, the car was searched by an FBI agent, and I believe some parts to a stolen automobile were discovered in the trunk of this automobile.

And the court held there that Preston controlled that case. On page 273, appellants argue their conviction on count 1 must be reversed because the search conducted by the officers violated the Fourth Amendment and the court erred in permitting the testimony resulting from that search. Even where probable cause exists a warrantless search is forbidden unless made incident to a valid arrest or justified by exceptional circumstances, such as signifi-

cant possibility of removal or destruction of the object of the search, here the automobile.

Even before the recent case of Preston, it was clear that a warrantless search of a car in police custody at a time after the occupant's arrest and under circumstances where there is no danger of removal is illegal.

And they cite Rent, Shurman, and Millette versus the [fol. 205] State of Mississippi.

Now, I believe that the facts in this case fall right into place with Preston and cases cited therein by the Supreme Court in the Preston case. As Your Honor knows, in the Preston case I think the search commenced approximately an hour or hour and a half after these people were arrested for vagrancy. The car was taken to a police garage where there was no danger or no need for search of the automobile without a warrant.

Now, in this particular case, what made the search of the automobile exceptional? There was nothing to search the car for protection of the Police Department. Certainly they weren't afraid at this time that there were any weapons in the car which the defendant could use, because he was already under arrest.

THE COURT: Well, the testimony is also uncontradicted that when the car arrived at the lot upon which the tow truck had deposited it, it was not locked, the windows were down, at least some of the windows were down, and it was raining. The testimony also is that the tow truck placed the car at the end of the lot near some bushes or some hedges, that the lot is not enclosed so that intruders might be excluded. As a matter of fact, it is readily accessible to members of the public through the [fol. 206] hedge and through two driveways that go into this particular area.

Now, you have a police regulation that is designed to secure the contents of valuable property which might be in an impounded automobile. I think it is very clear from the evidence that whatever searching Officer Baker intended to do at the time he first left the precinct building was with a view only to obtaining this property and turning it over to the property clerk. It is not to suggest that, in view of the Johnson decision the regulation has opera-

tion, but at the very most that is what he had in mind. True, at a later time after that card was discovered and it created the suspicion in the Officer's mind that other fruits of the robbery might also be found in the vehicle, he made a search of the vehicle for the purposes of discovering incriminating evidence. But when you say, counsel, that there was no justification for what was done here, I simply suggest that that conclusion does not automatically follow. And I do suggest that here you have circumstances which appear to be somewhat, to say the very least, different from those involved in Preston, which brings me down to the question as to whether or not under these conditions the Preston doctrine really does apply.

MR. WEINSTEIN: Your Honor, I don't believe that the motive would make any difference, whether he did not [fol. 207] intend to find this card or whether he was just going out to take valuables out of this automobile.

THE COURT: I understand the position of Mr. Harris to be that if the Officer for any purpose whatsoever disturbs any part of the vehicle, or at least if he opens any door of the vehicle for any purpose whatsoever after the defendant has been arrested and taken into custody and the car has been impounded and if in the process of opening the door he finds an item of evidence, that evidence cannot consistently with the Fourth Amendment be employed at his trial. Is that your position?

MR. WEINSTEIN: That is our position.

If Your Honor please, I would like to point out one other point. The police officer did testify that he intended to have a search of this automobile. For what reason, I can't really say, because I don't know whether that was in his mind or whether he was looking for evidence. He commenced a search of this vehicle when he went out and put that property tag on the car, opened the door, and looked in the glove compartment and under the seats and in the back. He had commenced this search already, and this was foremost in his mind. Foremost in his mind was to search this vehicle to find valuables; and when he opened up that door on the other side, he was still in the [fol. 208] commission of a search of that vehicle. There was no interruption, except the time it took him to walk

around the car. And when he went out to the car to search the vehicle and he found something incriminating at that time, under these circumstances it would be suppressed under Preston. There can be no difference, because when he opened up the door of the other side, he was still searching the vehicle. There was no lapse in time to change the intent or the frame of mind of this Officer. Even though he may not have intended to find this card, he still found it. He discovered something as a result of opening up this door.

There is one other point which shows his motive. When he got into the car the first time, he could have rolled up the window on that door at that point. He was looking in the glove compartment. All he had to do was stick his hand out and roll up that window. So that would lead us to believe that maybe he was looking under all of these door jambs or floor wells. Or why would he have opened up the door?

THE COURT: Well, he said he did it.

MR. WEINSTEIN: Yes, I know he said he did it. But I don't know whether we can determine his motive or not, and I don't really think that that is important. My contention is that at the time he opened up the door to place that tag on the car and to commence that search, [fol. 209] anything that followed or anything discovered as a result of this original search was in violation of the defendant's rights as covered by Preston.

THE COURT: Counsel, I would like to ask you one question. Have you run into any decided case that seems to pretty well square with this case on the facts, or have you had the same experience that I have had, not being able to find one that is on all fours with this case? Do you have anything that squares up on the facts?

MR. WEINSTEIN: Has Your Honor read Travers?

THE COURT: Yes, I have read Travers, but Travers is different.

MR. WEINSTEIN: The car was locked there. I have not found anything that is really on all fours.

THE COURT: Travers, in my judgment, is a long distance from this case, if you are speaking about the Travers decided by the Municipal Court of Appeals.

MR. WEINSTEIN: Yes, that is the one I am speaking of. No, I have not come across a case on all fours.

THE COURT: Very well.

MR. WEINSTEIN: I don't know how much time I have used up. If I haven't used all of it, I would like to use some in rebuttal.

THE COURT: The Clerk tells me that you have ex-
[fol. 210] hausted your time. However, under the circumstances, I will give you two minutes for rebuttal after Mr. Epstein has presented the Government's argument.

Mr. Epstein.

ARGUMENT BY COUNSEL FOR GOVERNMENT ON MOTION TO SUPPRESS

MR. EPSTEIN: The Government has several theories that it would like to advance with regard to how the Court might look at the facts in this case. First, we suggest, as we suggested at the conclusion of Friday's session, that the automobile—and we would first direct Your Honor's attention to the proceedings on M Street—that at that time when the automobile was seized and taken, it was an instrumentality of the crime; that the Officer had reason to believe, probable cause to believe that this automobile had been used in the commission of a robbery on the night preceding; and that when the Officer saw the automobile, he had good reason to take the automobile. It is not just that he took it as incident to the arrest of the defendant and had it impounded at that time; but, rather, it is to be considered more as the instrumentality of a crime in the same way that a gun might be considered as an instrumentality of a crime, or as in the case which I have cited to the Court, Guido, where a pair of shoes was considered an instrumentality of the crime where a footprint was left in a bank after the commission of a bank robbery. [fol. 211] Now, inasmuch as the automobile was an instrumentality of the crime and in response to the defense counsel's argument, why did the Officer take this car and not the car belonging to the defendant Hines, I think the reasons are very clear; and they show the underlying reasonableness and good faith of the police

officers. The officers took this car because, as I said, it was the instrumentality. The car itself would figure in testimony if the case were to go to trial. The witnesses that the Government would present would give testimony with respect to the car to tie it into the crime itself. There might be some question as to the tag number, there might be some question as to the color, there might be some question as to the tire prints, there might be some question as to the model of the automobile. All of these considerations are why instrumentalities of crime are allowed to be seized by the police when they are investigating a case, when they are making arrests, rather, in a case, or when they arrest someone; and in this situation where the defendant himself was arrested in his car which was an instrumentality, therefore, the police action was reasonable with respect to this car. It would have been unreasonable with respect to the car belonging to the defendant Hines, for at that point Hines' car was not violating any traffic regulation. It was properly parked as indeed was this car, [fol. 212] and Hines might have been able or perhaps was able to make some arrangement to have the car removed from the street by some friend or acquaintance or, indeed, if he made bond, would have been able to get out on bond and have the car taken away from the area so that he wouldn't violate the eighteen or twenty-four hour law for being parked in the same spot. But that is not applicable to this car which, as I say, was an instrumentality of the crime.

Now, taking that one step further, Your Honor, once the car has arrived at the precinct and treating this car as an instrumentality, the police, we would suggest, and arguing without conceding that the fact situation so show, the police would be able to make any search or test with the car that they so chose. For example, when a gun or some type of weapon is seized, there is no question but that the police or technicians in the police laboratory may make ballistics tests. For example, when an article of clothing is taken, as was taken in the Robinson case, an article of clothing that the defendant himself was wearing, there was a pair of trousers, and

I believe tests for blood stains were made. With an article of clothing taken, tests for blood may be made, fiber tests may be made in some attempts to link up the fibers on the article of clothing with perhaps the fiber that is found at the scene itself. Well the same way here, [fol. 213] Your Honor. This use of the car where it is an instrumentality allows the police a much broader leeway in treating the vehicle and deciding what to do with it. This article is no longer subject to the same safeguards where it is an automobile as it would be where the automobile was seized and the defendant happened to be driving in that car. Then the Preston set of situations would operate. In Preston, for example—

THE COURT: You say this is like contraband.

MR. EPSTEIN: I would say in a sense it is like contraband. It is an instrumentality. Contraband is a good analagous situation in so far as the police can turn the narcotics over to the chemist, and the chemist can then make tests on the narcotics itself. The same way, as I say, with reference to an article of clothing, as in both the Robinson and the Guido case, where in one case it was trousers and the other it was shoes, which the courts held were instrumentalities of the crime. Or in the case of where a rifle, for example, was used in the commission of a crime or there was reason to suspect, rather, that it was used, then ballistic tests may be made with reference to that.

That is why the Government suggests, Your Honor, treating this as an instrumentality, and that is the justification for the police seizing this car. There were [fol. 214] good reasons for taking the car independent of anything that would be found in the car, merely to identify it, to take pictures of it, to make sure that this was the car that the witness saw on the preceding night. Those were good reasons for taking the car. And the underlying reasonableness is underscored by what the police did not do with reference to Hines' car. They didn't take his car. There was no reason to take his car, and it would have been unreasonable to take his car.

THE COURT: By what authority did the police impound Mr. Harris's car?

MR. EPSTEIN: Under Rule 41(b) there is discussion in all the cases that are set out as to what may be seized. There is contraband, instrumentalities of the crime, and fruits or proceeds of the crime.

THE COURT: I think you have answered my question. There is no special statute.

MR. EPSTEIN: There is no special statute, but there is a long history of case law dating back to the Weeks case if not earlier. This is one of the three categories. This is not being seized for evidence in its broadest sense. The Officer testified on one of his appearances in the courtroom that this was being seized as an instrumentality of the crime, and I merely juxtapose the fact that the Hines' car was not [fol. 215] taken to underscore the reasonableness of the police action here.

Now, on that argument, then, Your Honor, it is our contention that anything that the police did with the car at that point, since it is an instrumentality, would have been reasonable.

* * * *

[fol. 218]

* * * *

MR. EPSTEIN: Thank you, Your Honor.

Therefore, Your Honor, I urge upon the Court this theory, that this was an instrumentality and that the police action with reference to an instrumentality is not governed by the same considerations as is a seizure or an impounding of a vehicle where there is no evidence that the car is involved in the commission of the offense, but only the car was seized because the defendant happened to be in it at the time of his arrest.

Now, assuming that the Court does not wish to follow this theory, we have several other arguments we would urge upon the Court, and that is the automobile, once it arrived at the precinct—and I would again say that the seizure of the car was pursuant to the fact that that was an instrumentality—but once it arrived at the precinct, the Officer testified at great detail, and the testimony has been accurately recalled by Your Honor, as to his procedure with reference to the automobile. And he

testified why he went out and exactly what he did when he did go out to the automobile; and that his purpose at all times was to secure [fol. 219] the vehicle so that no charge could be made against the police that certain valuables were in the car when the car was brought into the impounding lot and that the valuables were missing at some later time when the defendant was allowed to have his car again.

THE COURT: Could you point to the specific provision of the regulation that requires the inventory of articles in a motor vehicle which has been impounded? I believe when we were here last week you suggested that it was Rule 10 or Section 10 of these regulations.

MR. EPSTEIN: Your Honor, it was General Order No. 10. I misunderstood Your Honor's reference. It was Sections 11 and 12, I believe. I was referring to the General Order No. 10, and I thought Your Honor was referring to that as No. 12.

THE COURT: Is it the same one that was involved in Williams versus the United States?

MR. EPSTEIN: To the best of my understanding, Your Honor, it is.

THE COURT: I would still like to know, because these are some fairly long sections; and if you put your finger on it—you don't have to do it at this point, Mr. Epstein—we will be taking a recess before you complete your argument. I suggested when we were here last week that I thought it was Section [fol. 220] 12; but I would like for you to identify it.

MR. EPSTEIN: That is correct, Your Honor. At the time I made the reference to 10, I was referring to General Order number, which is General Order No. 10; and I thought Your Honor was referring to it as General Order No. 12.

THE COURT: All right. Would the general provision be the first paragraph of Section 12? I will pass the regulation down.

MR. EPSTEIN: Your Honor, I have a footnote here which is a quotation from that general order, and it is in the Williams versus the United States case at 170, Footnote No. 1.

THE COURT: It is the same provision, is that correct?

MR. EPSTEIN: Yes, Your Honor.

THE COURT: All right. I had so assumed, Mr. Epstein; but after we had our little colloquy, I had looked in vain Section 10.

MR. EPSTEIN: I was thinking of the general order number, Your Honor, and I am afraid I caused the confusion. In this, Section 12 does talk about the responsibility of the officer and the scope of the search that he should conduct with reference to an inventory; and it sets [fol. 221] forth exactly where he is to search, including the glove compartment and the trunk and that he is to remove all the property therefrom. I know of nothing that has changed as far as the general order is concerned, or of any case that says that the general order is in error and that it should not be followed.

THE COURT: Well, wouldn't the Preston case raise the question as to the applicability of this order?

MR. EPSTEIN: No, Your Honor.

THE COURT: Why not?

MR. EPSTEIN: I think there might be a question of the circumstances of Preston. There there is no indication that any such general order existed, that the search was for any purpose other than to gather evidence. It was not for a purpose of determining the inventory of the vehicle. And I would distinguish the Preston case from the case before the Court on several grounds. First, of course, the car was not seized as an instrumentality. There the persons were arrested for vagrancy; and as the Court noted in that case, vagrancy does not have either fruits nor, I would add, does it have an instrumentality such as an automobile. Just being is almost the criteria of vagrancy.

Secondly, the search, of course, was not concurrent. Now, as far as being concurrent, I think that the search here was not concurrent in the sense that it concurred at [fol. 222] the moment that the vehicle was seized; but I think that, again, it was good judgment on the part of the officers not to conduct such a search. First of all, they had theiy primary responsibility with reference to

safeguarding the physical persons of the defendants, safeguarding them for the custody.

Secondly, to conduct a search such as conducted in Adams, which was cited by defense counsel, and which Preston does not say could not be conducted, would require sort of tying things up in the street there and might cause some neighborhood animosities and friction if the officers were to start looking around the car and opening the trunk and opening the glove compartment; and, meanwhile, the defendants are there also; and the situation would not be one that would be the best method of conducting such a search. Traffic might get tied up, the curious would gather, and then the defendants also would have to be kept under observation at the same time.

So that this search was concurrent in the sense that the car immediately after it was taken back to the precinct, and that occurred in a logical sequence of steps, at the time the officers left the scene, they made arrangements with the officers on the scene to look at the car, to see that no one disturbed it, and also for the Police Department crane to come out and pick up the car and bring [fol. 223] it into the precinct. So it is concurrent in the sense that there wasn't a period of several hours elapsing with nothing being done with regard to the automobile. And in Preston there was a suggestion that the fruits of the car, inasmuch as vagrancy has no fruits, that there was no reason there for the police to conduct any kind of a search of the vehicle. Whereas here there was a robbery. There was no question that there were fruits of the crime. A wallet had been taken and a large amount of money had been taken, and it was entirely reasonable for the police officers to conduct a search of the vehicle under these circumstances.

So we would suggest that Preston does not preclude this type of search, even absent the general order, and that the general order provides for a reasonable method of safeguarding the valuables of the vehicle; and that the Officer in the process of conducting this reasonable method, which is what the McDaniel case talks about, it talks about the reasonableness of what they did, the

general order is entirely reasonable in its suggestion that in the process of conducting this inventory, this reasonable method of safeguarding the valuables of the defendant, the officers saw something, that is, the card; and since he saw it in a proper manner, there is no reason why he should not be able to testify as having seen it and, further, as to why the card should not be allowed [fol. 224] into evidence in this trial.

We would therefore suggest, as Your Honor pointed out in questioning with the defense counsel, that the open view doctrine does apply here, that the Officer in the events surrounding his seeing the card, was opening the door for the purpose of rolling up the window and not for the purpose of taking the seats of the car out or for going into some area of the car, but was merely trying to safeguard the vehicle so that later accusation couldn't be made that the police had not taken proper care for this valuable piece of property, the automobile.

THE COURT: You do have this difference, Mr. Epstein. In the cases involving the plain view or full view doctrine, well, certainly those in this circuit, it has generally been a situation where nothing had to be changed, nothing had to be moved from one position to another before the object, whatever it might have been, was perceived. In this situation the door had to be opened before Officer Baker or anyone else could possibly have seen the registration card between the bottom of the door and the top of the door jamb.

MR. EPSTEIN: That is correct, Your Honor, except in the McDaniel case which Your Honor called to our attention, there the officers had gone over to the house and been inside and there they were invited over to the [fol. 225] house. Now, Your Honor, if in this case the Officer had seen something inside the glove compartment while carrying on this inventory search, then my argument would be somewhat different and I would have to stress even more the applicability of the inventory search or, indeed, if the Officer had seen something in the trunk. Taking out of context for the moment the isolated incident of opening the door and seeing the card has no relationship whatsoever to anything that the Officer

did with regard to searching the rest of the car. At that point he was not searching. At that point he was trying to safeguard the car. He wasn't opening the door in order to look to see if by some chance there was something, because that kind of speculation is not the kind of speculation that an ordinary police officer doing a good job would engage in. It is rather inconceivable that one could have anticipated that this card would be in that location. It is certainly conceivable to think that something would be in the glove compartment or something would be in the trunk; but to think at that point he is looking in all the door jambs is something that I think goes far beyond the realm of anything that an ordinary police officer or even an extraordinary police officer would consider as an area for hiding proceeds of crime.

So I suggest, Your Honor, that at that point, absent anything else that happened before and after, and I think [fol. 226] Your Honor could look at it that way, the Officer was not engaged in any kind of a search. Now, if he were engaged in a search before this happened, I would urge upon the Court that that was an inventory search, and in compliance with General Order No. 10, Section 12, which has been cited, and quite proper; and that in the alternative, absent that general order, that this was still a reasonable search; and even further, absent the reasonableness of it, that inasmuch as this was an instrumentality of a crime, the Officer could treat this property in a manner entirely different than what is required from him if this were not the instrumentality of a crime.

THE COURT: Would you want to say anything about Williams versus the United States that did involve the very section of the departmental regulation upon which you are partly relying?

MR. EPSTEIN: May I just have a moment to refresh my memory of this case?

THE COURT: Certainly. That was the case in which the defendant was arrested for speeding; and pursuant to directions given to him by the arresting officer, he drove his automobile from the point at which he was stopped

down to the precinct station. He was told to do this. However, he apparently drove the automobile in front of the [fol. 227] precinct station and left it there. He went on the inside, and he was required to post collateral that he didn't have. He called his wife, and she was trying to arrange it for him; but in the meanwhile, the defendant is kept on the inside.

MR. EPSTEIN: Yes, Your Honor.

THE COURT: The police get concerned about the car being in front of the precinct station and they moved it.

MR. EPSTEIN: I am prepared to comment on that. Your Honor, in the concluding paragraph of the court's decision in that case, the court noted that the Government had not shown that the automobile was impounded pursuant to this regulation. Therefore, the Government, or the police in that particular instance, had no right to anything with regard to the car. The man was arrested for a traffic violation. He was not violating a parking violation at the time the car was taken, and then the car was taken without any reason for the car having been taken. In this case, the car was seized because it was the instrumentality of a crime. The police had reason for impounding the car; and then General Order No. 10, which the court in the Williams case does not suggest is improper, was followed. The court doesn't suggest that there are not occasions when a car may be properly impounded. The court merely states that the regulation has no effect when the car is not properly impounded, that there has to be a reason for [fol. 228] impounding an automobile; and merely because the car is parked and the defendant has been arrested, in the Williams case, does not give the police the right to search the car.

THE COURT: As you have stated, in the Williams case, the Government failed to demonstrate any basis upon which the automobile might validly have been moved from where it was. The difficulty proceeds from the manner in which the police department gains possession of the vehicle. It was in front of the precinct station, all right, but the Municipal Court of Appeals could

not find any violation of a traffic regulation or legal violation in that.

In this case the car was impounded because, at least from the police viewpoint, it had been involved in the robbery the day before.

I think I would like to have your comments on this, and I will afford counsel for the defendant also an opportunity to give his views. There is one critical sentence in this whole opinion, and I would like for you to give me your view as to what it means:

"We do not question the procedure prescribed by Section 12 of General Order No. 10, which affords protection to property in police custody, but we are concerned with the legal basis by which the police acquired control of the automobile."

[fol. 229] Do you understand the court there is holding that in a proper case Section 12 may validly be applied? And if you answer that in the affirmative, my next question to you would be: In view of the fact that this case was decided in 1961, do you think the Supreme Court's decision in Preston versus the United States necessitates any change in this regard?

MR. EPSTEIN: Your Honor, I certainly would answer that the Court's understanding of the Municipal Court of Appeals case is proper, that the Municipal Court of Appeals was saying that General Order 10 appeared to it to be quite the right procedure to follow, and that it was not the right procedure to follow in Williams, because the automobile must first be impounded with the correct authority. There was no authority for the police to impound the automobile in Williams; and, therefore, there was no authority to conduct the inventory search under General Order No. 10.

Now, with reference to Preston, although we have distinguished or attempted to distinguish Preston on several grounds, even not considering General Ofder No. 10, in as far as reasonableness is the standard to be considered, in Preston the police were taking the automobile; and there was no suggestion that they had any provision similar to General Order No. 10, but that there only [fol. 230] reason for going out to see the automobile an

hour and a half after it was seized was to determine whether there was anything in the automobile that would be incriminating against the defendants who had been arrested for vagrancy, a crime, as the Court noted, has no fruits to it. And yet the police went out there with the purpose of conducting a search, not conducting an inventory search, not safeguarding the valuables that might be in the car, but rather with the purpose of determining whether there was something in the automobile that would incriminate the defendants in some other fashion; and that distinction, Your Honor, I think is sufficiently strong that allows us to suggest or to state that the Preston decision is not applicable on the facts of this case.

Your Honor may choose to view the entire circumstances as to what occurred in the automobile here rather than, as I have suggested, as considering this an instrumentality, which is a distinction from the Preston case, or considering the open view doctrine, that at the moment or the time the Officer saw the card he wasn't searching, but was merely closing the window; and certainly this was reasonable, far-sighted thinking on the part of the Officer to safeguard the property of the defendant.

I would say that Preston is clearly distinguishable in so far as there is no suggestion there that any police [fol. 231] regulation governing inventory search is present nor that there was any reason other than to conduct a wide ranging search, a fishing expedition, indeed, to see if there was anything in the automobile that might turn up that would incriminate either some or all of the defendants.

THE COURT: Very well, Mr. Epstein.

I am going to take a recess, gentlemen, before I hear the rebuttal. Mr. Weinstein, I am going to give you five minutes on rebuttal instead of two, because I would like for you to address yourself to the last question which I put to the Assistant United States Attorney.

Mr. Crickenberger, I would be very happy to hear from you on this motion if you wish to participate. I don't know whether you have any view that you would like

to express to the Court. I will give you a few minutes to do so;if you would like to be heard, you may indicate to me upon the conclusion of the recess.

At this point, Marshal, the Court will stand in recess for ten minutes.

* * * *

[fol. 232]

* * * *

THE COURT: Mr. Epstein, let me ask you one question.

MR. EPSTEIN: Yes, Your Honor.

THE COURT: Has there been any case that has come to your attention other than Williams versus the United States involving Section 12 of General Order No. 10 of the Metropolitan Police Department?

MR. EPSTEIN: No, Your Honor.

THE COURT: Very well.

MR. EPSTEIN: Your Honor, you asked the defense counsel a question before, if there are any cases in point. I cannot find any case directly in point, but I did bring to Your Honor's attention several cases in other circuits which have similar searches but not quite exactly in point. However, they all are before the Preston case.

THE COURT: Yes. Mr. Weinstein.

FURTHER ARGUMENT BY COUNSEL FOR DEFENDANT HARRIS ON MOTION TO SUPPRESS EVIDENCE

MR. WEINSTEIN: Your Honor, drawing my first remarks to Mr. Epstein's argument that the automobile was an instrumentality of this crime, the court in Preston stated that the automobile was no different from a house as far as a search is concerned; and the same requirements would apply to the search of an automobile [fol. 233] as would apply to the search of a house.

THE COURT: You are speaking about Preston now?

MR. WEINSTEIN: Yes.

THE COURT: The court quite to the contrary, Mr. Weinstein, pointed out that the standards for the search of one's habitation might differ from those governing the search of his motor vehicle; but, in any event, the search

must still be reasonable, notwithstanding possible differences. In the Preston situation, the search was not a reasonable search.

MR. WEINSTEIN: Yes, directing my attention to that. Now, the fact that the police officer considered this automobile, if it was seized as an instrumentality of the crime, I was not aware that the automobile was going to be introduced in this trial as evidence to be identified by the complaining witness.

THE COURT: I don't gather that they are going to bring the automobile in, either.

MR. WEINSTEIN: I don't either.

THE COURT: I understand from the evidence, however, that it would be in the custody of the police officers; and presumably a witness or witnesses, I don't know just what the score in this regard is, would view the automobile and would be in position to give testimony as [fol. 234] to whether or not it was the automobile that previously had been seen. After all, the police were given this information; and it was on the basis of the information that led to the events which we have under consideration here.

MR. WEINSTEIN: The car was subsequently returned to Mr. Harris. Now, the fact that it was an instrueentality of this crime does not give the Police Department the right to conduct an exploratory search which we contend was unreasonable some one and one-half hours later. As far as identification of the car, they didn't need to search the inside of the car in order to identify it.

Mr. Epstein's argument as far as the search is concerned, the fact that the police officer wouldn't ordinarily look under the door jamb to find this card, if he knew where the card was at first he would have just gone there and opened up the door, he wouldn't have searched the whole vehicle, I believe he testified at some subsequent time he even took the back seat out to see whether or not there was any evidence in the springs of the car. Now, a good police officer when he makes a search, he makes a thorough search. He never knows where he is going to find any evidence. The same

as when you go into a house to search a house for narcotics or lottery paraphernalia, you never know where you are going to find something. So this argument, I don't see [fol. 235] any basis for that.

As far as the Williams case is concerned, which Your Honor directed your last question to, the Court does not decide the question of the validity of Section 12 of General Order No. 10. They avoid deciding this issue. And they base their decision on another point, that is, the means by which the car came into the custody of the Police Department.

Now, this case was decided in 1961. Now, Preston was decided this past year in 1964. It is our contention now that following the decision in Preston that this order is going to have to be changed; that the police when they seize a vehicle and they do not search it contemporaneously with the arrest, but they do search it at some subsequent time and they do find evidence or fruits of a crime, that they will not be able to use it against the defendant in some subsequent criminal proceeding.

THE COURT: What do you do in a situation like you have here, Mr. Weinstein? Here is a vehicle the description of which and the tag number of which had been furnished to the police officers. It is on the basis of this information that, upon a check, they identify Mr. Harris by name, get his address, go over, find the vehicle parked there, and arrest him when he attempts to operate the vehicle. Now, [fol. 236] this is not a situation in which the only connection which the defendant may have had with the vehicle was that he just happened to have been riding in the vehicle. That was the situation in Preston. Now, under these circumstances, you wouldn't—I know that you question the right of the police officers to make what you term a general exploratory search of the vehicle which is not contemporaneous with the arrest of the defendant, but their taking charge of the automobile, do you have any quarrel with that under these circumstances?

MR. WEINSTEIN: No, I don't have any quarrel with that.

THE COURT: Not to search it.

MR. WEINSTEIN: No.

THE COURT: The evidence before me, and it is uncontradicted, that the automobile was impounded in order that it might serve a purpose in and of itself as distinguished from what a search of it might reveal.

MR. WEINSTEIN: I have to concede that the seizure of this automobile at the time he was arrested was valid.

THE COURT: Now, they have the automobile; they have it on this lot. It is exposed. The windows are down, the doors are not locked, and the probability is that it contains some property. As a matter of fact, you yourself suggested in one of your questions to Officer Baker that [fol. 237] there may have been one or two guns in the automobile, but he didn't seem to recall whether they were in the car or not. Now, they have it down on this lot. It is parked over near the hedges. The lot is not enclosed. People can walk in and out of the lot. Under these circumstances, do you feel that an order which provides reasonable measures for securing the contents of a vehicle is unreasonable?

MR. WEINSTEIN: Yes, Your Honor.

THE COURT: Remember, we are in this context. This is an automobile which for purposes of the case is not simply a medium of transportation. It is an instrumentality.

MR. WEINSTEIN: Your Honor, I have to distinguish this case in this fashion. In Williams the car was seized as a result of a traffic violation. Here, when they seized the car, they seized the car incident to a robbery where they had information that the car allegedly had been used as the getaway car in a robbery, and they intended to conduct a search. I don't say they intended to conduct a search the way they did it, but they did intend to check this automobile over at some future time after they impounded it.

THE COURT: At what time did this intention arise?

MR. WEINSTEIN: Well, as it turned out, they searched this vehicle at 3:10 p. m. Now, once they got [fol. 238] this vehicle into their possession, then, after the lapse of one hour and a half, they were under a duty

to go down and get a search warrant in order to search this car, because they at that point may have suspected that there was some evidence in this car that came from this robbery the night before. Now, it follows logically if the car was used in a robbery that there might be some evidence in it. Why did they go down to get a search warrant the day afterwards and come back and search the car? Why did they then do that? They knew that they needed a search warrant. That is when they went into the back seat.

Now, as Your Honor knows, in the Adam case the car there was used as the instrumentality of a robbery also. These people were arrested in an automobile in a parking lot behind a liquor store which was robbed. Now, the fruits of the robbery in that case may have been in that automobile. And they very likely would have been in that automobile. The court there insinuates through their language that a search at a time later, not at the time of the arrest which did occur where they did search the car at the time and place of the arrest, but they do say that a search of this car at some time later on would have been a violation of the defendant's rights as held by Preston.

THE COURT: Wouldn't your argument have necessi-
[fol. 239] tated a different conclusion in Adams, in that there was no reason, the court feels, to recognize, that there is no particular reason for not awaiting the issuance of a search warrant before going into the trunk of the vehicle?

MR. WEINSTEIN: I would say this, Your Honor, that in the Adams case the search of the trunk which revealed a weapon, I don't know whether or not the defendants could have gotten to the trunk, how many police officers were there, whether or not it was feasible or not feasible to open up the trunk at this particular point.

THE COURT: I take it that the Court of Appeals didn't feel there was the danger of any of those things.

MR. WEINSTEIN: True. Of course, the situation is still a little different here, because he had searched the car on M Street and found nothing.

THE COURT: Well, he made some sort of investigation. In the legal sense, yes, there was a search. If he simply reached under the back seat, I would think there was a search in contemplation of the Fourth Amendment; but in so far as inspection of the vehicle to see what it may have contained, I don't think we can say that. The Glove compartment was not entered, the trunk was not entered. All that happened up on M Street at the very most was a visual inspection of the car, and that was the time when the open beer can was [fol. 240] perceived to be in the car and some feeling around or an inspection of some sort that I am not impressed was substantial for the purpose of seeing whether there was any weapon within the range of the defendant's ability to get his hands on and perhaps injure one of the two police officers.

MR. WEINSTEIN: I believe the only other thing I have to add to that, Your Honor, I think he did testify that he put his hands under the seats.

THE COURT: Yes. I think that is all that occurred on the basis of his testimony. He wasn't even certain about that, but he thought he might have.

MR. WEINSTEIN: Let me say this. If the Officer had viewed the property of the defendant through the windows of this automobile at the police station, he found nothing, he saw nothing in view, he saw nothing in the glove compartment, and yet he continued his search. The only thing he sees was this card. So that from his actions it is obvious that he did continue his search, because apparently he was looking for some other evidence.

That is all I have, Your Honor.

THE COURT: Very well, Mr. Crickenberger, is there anything you would like to say?

ARGUMENT BY COUNSEL FOR DEFENDANT HINES ON MOTION TO SUPPRESS EVIDENCE

MR. CRICKENBERGER: Just a moment of the Court's time if you would indulge me. I am not certain [fol. 241] in my mind whether we are in agreement as to the interpretation of the facts surrounding Officer

Baker's first trip to the automobile. It is my understanding that Officer Baker testified when he left the precinct building that it was his intention to make the search required by regulations of the automobile, including the interior of the car, the glove compartment, and the trunk.

THE COURT: I will tell you what I think, and I feel compelled to find these as facts for purposes of this motion. He went out to the automobile to do several things: to tag the car, to roll up the windows, to lock the doors, and to, if you want to call it, search, to go through the automobile to see whether or not there was any valuable property in it which under this regulation he was required to look for and which he was required to secure if it had been discovered. In other words, the situation is as I thought it was this morning with one exception. He also had that additional thing in mind before he left the precinct station and went out on the lot to do all of these things. Wouldn't you say that is a fair appraisal of his testimony?

MR. CRICKENBERGER: Yes, sir, but it appears important to me to ascertain that he did intend to make this search, and that the search was to include the glove compartment, the interior, and the trunk, because I be-
[fol. 242] lieve it is important to the defense position here that Officer Baker, after having searched the glove compartment and the interior of the trunk had not abandoned his search, but intended further to search the trunk, and that there was no abandonment of the original search when he went around to the other side of the automobile and opened the right front door.

THE COURT: Well, the testimony is, and he says very plainly that he had all these things in mind; and before he finished with the vehicle on this particular day, I think it was his conclusion which the evidence compels that he intended to see that all these things were done; and they were all done, because eventually he even looked in the trunk.

MR. CRICKENBERGER: Then the card was found in the course of the search.

THE COURT: I don't know that that necessarily follows.

MR. CRICKENBERGER: Well, if he began the search by looking in the glove compartment and the interior and if he intended to include the trunk—

THE COURT: Was he searching at the time he opened the right front door?

MR. CRICKENBERGER: If he intended to include [fol. 243] the glove compartment, the interior, and the trunk, and he had searched the glove compartment and the interior but had not searched the trunk, then I don't see how we can conclude anything other than he intended to search the trunk during that same immediate transaction.

THE COURT: He made it very plain, however, that the only reason he opened the right front door was to raise that window.

MR. CRICKENBERGER: Then is it the position of the Court that he abandoned the search and went off on some other project before he was to go into the trunk and would he reassume the search when he went into the trunk?

THE COURT: If the Officer properly came into possession of the registration card, then there is no basis upon which I can suppress this evidence. In other words, the question that you just put to me is one of the matters that I have to decide.

MR. CRICKENBERGER: I was afraid that the Court was assuming all along that this trip around to the right front side of the automobile to open the door was separate and apart from the continuous transaction assumed by Officer Baker.

THE COURT: Counsel, let me give you the evidence. Certainly, I don't intend to assume anything. The Officer [fol. 244] testified that after putting the tag on the steering wheel while he was partly within the interior of the automobile he looked in the glove compartment, he thinks he looked behind the visors, he certainly made a visual inspection of the interior of the car. He also tells us that it was his purpose also to look into the trunk. Now, he is sort of half in and half out of the left front door. He abandons this position. And then he starts rolling up windows. I am not so sure as to whether he rolled

up three windows or whether he rolled up two, but I am satisfied that he rolled up two. I am satisfied that he at least rolled up the right rear window and the right front window. He goes around and he finally gets to the right front door. He opens that door and rolls the window up. And then he sees the card. And the Officer was asked not once, but twice, What was your purpose in opening this door? And each time he testified unequivocally that the only reason he opened the door was to enable him to raise the window.

Now, later on, he goes in the trunk. So that is the factual situation with which I have to deal. The question that you asked me, counsel, I think is the very question that I am going to have to decide.

MR. CRICKENBERGER: It is our position that at some point in that transaction he abandoned what he was [fol. 245] doing at the automobile, and it is our contention that he abandoned what he was doing when he found the registration card and then went back into the precinct.

Let me direct one other comment toward the Williams case, which apparently is being relied on for reaffirming the validity of the General Order No. 10, Section 12. It is my understanding from reading that case that the most the court said about Section 12 is that we do not question, because they did not decide it on that point. The court never had to question Section 12 that we are talking about, because they decided that the vehicle was improperly impounded. And Preston, which was decided subsequently, I believe clearly takes General Order No. 10, Section 12, and renders it invalid, because if we held that the police department could by a general administrative order eliminate all search warrants, and that is in fact what we are doing, any vehicle impounded by the police—

THE COURT: I am not going to decide that question, Mr. Crickenberger.

MR. CRICKENBERGER: —can be searched.

THE COURT: I am going to limit the Court's decision to what is specifically involved on this motion. I am not in the habit of going beyond the scope of what I

am called upon to decide. This legal question will be de-
[fol. 246] cided in its peculiar factual context.

MR. CRICKENBERGER: But, Your Honor, if the Court is concluding that Officer Baker found the card in the course of performing his duty under Section 12 of General Order 10 is that not in effect deciding?

THE COURT: Counsel, the Officer has told us, and it is the only evidence here, it is not contradicted, the witness said it more than once when asked specifically, "Why did you open that door?" "I opened that door to raise the window. Was that your sole purpose in doing so? Answer. Yes." Is there anything that counsel can suggest to me to cause me to disregard that testimony?

MR. CRICKENBERGER: Well, Your Honor, without being overly argumentative on the point, when he was asked why he went out to the vehicle, he said he went out to search the vehicle as prescribed by regulation under Section 12.

THE COURT: He told us today that he went out for several purposes. I am going to adhere to the evidence. But the Officer distinctly testified not only today but when he testified last week that he went out to put a property tag on the car. Wasn't that one of his purposes?

MR. CRICKENBERGER: That is part of carrying out Section 12.

THE COURT: That is one of his purposes, all right. [fol. 247] Is there anything wrong so far as Section 12 is concerned with going out and putting a property tag on the car or do you think that Preston prohibits that, too?

MR. CRICKENBERGER: No. I think the Officer is performing his duty under Section 12 when he does that.

THE COURT: Well, then, to the extent to which Section 12 only provides for tying a property tag on the car, do you think any Preston problem is raised by such?

MR. CRICKENBERGER: No, sir.

THE COURT: I don't think so, either. He also said that he went out to roll up the windows. Now, do you suggest that that is embraced within the contemplation of Preston?

MR. CRICKENBERGER: No, sir.

THE COURT: And he says also that it was his purpose to lock the doors or to secure the car. Is there anything wrong with this?

MR. CRICKENBERGER: No, sir.

THE COURT: All right. But he also said that he intended to inspect the car and to remove from it any valuables. That is one of the things that he had in mind when he went out.

MR. CRICKENBERGER: And that is what separates this case from the general hypothetical if you just say, if he opened the door and saw the card, would that be a violation?

[fol. 248] THE COURT: I am telling you what he said. He said he opened the door for the reason that he wanted to raise the window and for no other reason. That is his testimony. Do you disagree with that?

MR. WEINSTEIN: I agree with Mr. Crickenberger. I believe that all of this business started as a result of his compliance with Section 12.

THE COURT: Let us get to what the Officer said. If you will look on page 33 of the transcript you will find the question to which I made reference.

MR. WEINSTEIN: I am going to page 9, the question that says:

"Now, are there any other regulations or procedures that are followed in impounding an automobile?

"That is correct. We are required to take and close the vehicle. In cold weather we are required to check the antifreeze, and also we are required by law to search the vehicle and remove all valuables from the vehicle when it is impounded.

"What law do you refer to, Officer?" This is a question asked by the Court.

"THE WITNESS: The District impounding laws.

"THE COURT: You are referring to statutes as distinguished from regulations of the Metropolitan Police [fol. 249] Department?

"THE WITNESS: It is a regulation that we are governed by."

THE COURT: Counsel, I still don't get the point. I am clear that the Officer intended when he left the

precinct building to have looked through that car, including the trunk and the glove compartment before he went back into the precinct building; but at the time that he opened the right front door, he tells us that he did that not for the purpose—he doesn't say that he did it for the purpose of trying to find something in the car that might belong to the defendant he could secure. He did it for the sole purpose of raising that window.

MR. CRICKENBERGER: But, Your Honor, he was already in the process of trying to find something. That occurred right in the middle of the course—

THE COURT: Your argument is that having embarked upon the search, then until he got back into the precinct station anything that he may have uncovered during the course of this is suppressible. Mr. Weinstein's position is broader than that. He says that if the Officer opened the door of the vehicle for any purpose and found something it must be suppressed.

MR. CRICKENBERGER: I don't think the Court is [fol. 250] called upon to decide that at all.

THE COURT: I don't think so, either.

MR. CRICKENBERGER: The testimony here clearly indicates that the Officer had in mind to search the car under these regulations when he left the precinct, and the mere fact that he stated a single purpose in opening a door during the course of the search cannot negate the broad purpose of searching the automobile, which he stated to be his purpose when he left the precinct.

I think you understand my position.

THE COURT: I think I understand your position. What you are saying is that the opening of the right front door was a part of the search. As I take your position, that is what it amounts to.

MR. CRICKENBERGER: Unless we can show he abandoned the search, this was part of the continuous transaction he had begun when he looked into the glove compartment, when he looked behind the visors when he was in the automobile, because he had not yet searched the trunk which was part of his purpose.

THE COURT: Do you agree with Mr. Weinstein that his mental attitude, what he may have had in mind,

when he opened the door, is not important in this connection?

MR. CRICKENBERGER: I am stating that what he [fol. 251] might have had in mind as he grabbed hold of that door knob had nothing to do with negating his general purpose in searching that automobile which caused him to leave the precinct station.

THE COURT: What do I do with his statement that he opened the door solely for the purpose of getting to the mechanism operating the window and for no other reason? What do I do with that?

MR. CRICKENBERGER: I think you have to read that in the broad light of why he was out there in the first place, Your Honor.

THE COURT: If I didn't accept it, then I could easily see your point. But what I have been soliciting, and now for some time, counsel, is some reason, some suggestion which from the defendant's viewpoint would justify my concluding that I should not accept the Officer's statement. It is not contradicted. It doesn't appear to me to be inherently improbable. The Government has even suggested, and I do not buy all the Government's argument, either, but it has suggested that from a reasonable viewpoint to look for a piece of evidence under a door jamb is something that would perhaps be a bit uncommon. Human experience doesn't suggest that that is where evidence is ordinarily to be found.

[fol. 252] MR. CRICKENBERGER: I wouldn't want to impugn the thoroughness of the Metropolitan Police Department, Your Honor, but I don't see how we can ignore his purpose in going out there and the initial statements he made regarding this by merely calling attention to that.

THE COURT: I think his purpose in going out has a bearing. Whether it controls the question of suppression of the registration card having been discovered under the circumstances to which he testified is the question. But I understand your position, Mr. Crickenberger. You are saying once he had this in mind he must have given up his search completely. Otherwise, if he uncovered anything before he completely abandoned this idea of search-

ing the vehicle, then it is suppressible, because its admission would violate the Fourth Amendment.

MR. CRICKENBERGER: I am saying that whatever he might have uncovered while he was out there, unless he abandoned the search, was part of the search; and it is up to the Court, of course, to decide whether that search was illegal and the fruits of the search suppressible.

THE COURT: I think I understand your position.

MR. CRICKENBERGER: Thank you.

THE COURT: Is there anything further, gentlemen?

MR. EPSTEIN: No, Your Honor.

[fol. 253]

ORAL RULING BY COURT DENYING MOTION TO SUPPRESS

THE COURT: I will start off by repeating something that I said earlier. I have before me a motion to suppress a particular single item of evidence in this peculiar factual context. I am not dealing with the broad question of the right of police officers to conduct searches of motor vehicles not contemporaneous with an arrest of the defendant at all times and all places. I am not called upon to do that.

Let us go back for just a moment and deal with the facts. I think in view of a rather lengthy delineation that I made this morning a lot that otherwise I would be saying at this time can be saved. Also, I think some of the Court's thinking is very apparent from colloquies between counsel and the Court.

But I think it is worth while mentioning that in this case the police officer in question, Officer Baker, having been given a description of this automobile, having been given its tag number, having investigated from this information and found that Mr. Harris was the record owner of the motor vehicle and that he resided in the 2500 block of M Street, having gone to the 2500 block of M Street, having seen the car parked in the immediate vicinity of Mr. Harris's residence address, having seen Mr. Harris leave his residence, get into the car and take a seat [fol. 254] behind the steering wheel, after all of this occurred, the Officer did two things: One, the defendant was

placed under arrest. Two, the car was impounded. It has not been suggested to the Court nor could the Court conclude that either of these actions was unreasonable or illegal. Right away I find a difference between this case and the Preston case. Just what the situation might have been here if the defendant simply had been riding in the car and he just happened to occupy the car at the time he was arrested, the Court need not decide. That was the situation in the Preston case.

But here, from the very beginning, this motor vehicle has played a very prominent part in the apprehension of the defendant and the initiation of this prosecution.

Now, gentlemen, later on after the car is towed down to the precinct station, the Officer goes up on the lot where the car was. Bear in mind, I will repeat just once again, the man who operated the tow truck called attention to the fact that it was raining outside, that the windows were down and the doors were unlocked, and that he, the tow truck operator, had not done any of these things. One of the reasons, he stated to Officer Baker, was that he didn't want to disturb any fingerprints that might be in the car. Officer Baker left the precinct station and went out to the car having several things in mind. Not only [fol. 255] did he intend to tag the car and to run up the windows and to lock the doors but also to make an investigation of the vehicle to determine whether it contained any valuable property belonging to the defendant.

So going out to the vehicle and first attaching a property tag on the steering wheel, next having scrutinized the interior, having peered into the compartment, and having, according to his testimony, also perhaps looked behind the sun visors, he then got outside the car, closed the left front door, and then he gets around to the business of raising windows and locking doors. I believe he testified he locked the left front door at the time he left it. But be that as it may, and while he is in the process of undertaking to raise the window of the right front door, having opened the door for that purpose and, as I have stated to counsel, his testimony is very explicit, only for that purpose, he comes across the registration card.

Gentlemen, I think that at the outset we have a question as to whether or not the registration card is discovered

during the course of any search. I invited the attention of counsel to United States versus McDaniel, an opinion by Judge Holtzoff of this court in 154 Federal Supplement 1, which case incidentally, gentlemen, was affirmed by the Court of Appeals and the Supreme Court denied certio- [fol. 256] rari. In that case two defendants had been arrested, and they were in custody at Police Headquarters when two police officers went to the apartment owned by one of the two defendants and containing a room sublet by that defendant to his co-defendant, but they went there simply for the purpose of interviewing two women who also lived in the apartment. They went into the apartment. There doesn't appear to have been anything illegal about their entering; and during the course of this interview, and without making any search of the premises at all, one of the officers perceived a towel which was open to view in the room in which the interview was being conducted. The officer then received information from which it appeared that the towel was involved in the offense for which the defendants were later prosecuted. The officer had no search warrant, but he nevertheless took the towel, and there was a motion to suppress the towel on the ground that its admission into evidence would constitute a violation of the Fourth Amendment. This court reached the conclusion that it would not. In the language of Judge Holtzoff:

If without a search and without an unlawful entry into the premises a contraband article or an article which is needed by the police is seen in the premises, the police are not required to close their eyes and need not walk out [fol. 257] and leave the article where they saw it. It is not a search to observe what is open and patent.

I will say to you gentlemen that I spent a considerable amount of time trying to find a case that is on all fours with the instant case. I haven't been able to find it. Counsel have not suggested to the Court any such case. But I think the analogy of the McDaniel case to this case is close. It is true that in this case the right front door had to be opened before the registration card may have been perceived at all. And in the McDaniel case, by the same token, it was necessary for the officers to get in the

apartment before they possibly could have seen the towel. This, gentlemen, is not like the McDonald case where somebody looks through a transom standing on the outside and from all that appears in that case, access would have to be gained.

Now, if the entry into the apartment in McDaniel had been illegal, I am very sure that the result of the case would have been different. So, also, if the opening of the right front door by Officer Baker were tainted with illegality here, then I would think that the question before the Court would be quite different. But here the Officer opened the door, according to his testimony, solely for the purpose of raising the window. I know that it has been [fol. 258] suggested by counsel for the defendant that he had in mind a search which was not then completed. The suggestion has been made that he must have abandoned the idea of a search. Otherwise, the card must be suppressed.

My view on the matter is this. This is uncontradicted evidence. There is nothing that has been suggested to me by the evidence itself, or by counsel, that would lead me to the conclusion that it should be disregarded. As a matter of fact, I think the Government's evaluation of this testimony is appealing. Ordinarily, you don't go around opening doors and looking for contraband or looking for stolen articles or even for incriminating evidence under door jambs. The Officer, I think, has been very frank in his testimony. Where there have been things that may not have been particularly helpful to the Government's case, he has told us about those things; and I have no reason to discredit his statement as to which I don't think there can be any possible mistake, because, as I have stated to counsel, he was asked about it twice, and he was very emphatic about it. I must conclude as a matter of fact that he opened that door simply for the purpose of operating the window, raising the mechanism so that that window might be raised.

Now, is there anything unlawful or illegal about a police officer doing this? Nothing has been suggested to me [fol. 259] that would render this action on the part of the police officer illegal. If the officer had as a part of his

search opened the door to see what was under the door, then I think I would have a different question; but here he tells us that wasn't his purpose, that he was there for purposes only of raising the window. So I say, gentlemen, I think the analogy is very close. The officers in McDaniel could have entered the apartment legally or illegally. They entered legally, once there, and they found something. It was not suppressible if it was open to their view. By the same token, it is my conclusion that the Officer was not in any respect acting illegally when he opened the door for the purpose that he suggested that he opened the door.

Consequently, under these circumstances, it is the view of the Court that, having done what he did legally, the question then arises as to whether or not the evidence which then came into full view of the Officer can be suppressed; and I don't think the Court needs to spend much time on that.

You might take all of the cases commencing with the United States versus Lee in the Supreme Court and coming down to the cases not only in this circuit but also in other circuits, the law is very plain, that if an officer without a search comes across evidence that is open and in [fol. 260] full view, that under those circumstances he is not required to ignore it, and its use in evidence does not violate the Fourth Amendment.

Now, gentlemen, I think that, even independently of this, there is another basis. I think that either of these two bases is sufficient to necessitate that the motion to suppress be denied. There is Section 12 of General Order No. 10 of the Metropolitan Police Department. I am not called upon to rule upon the validity of that order in any and all circumstances. I deal with it only in the factual context that is presented here, a context, as I have suggested to counsel, that is quite different from the situation that was involved in Preston versus the United States. Counsel have conceded quite frankly, and I think the concession is necessary, that there wasn't any illegality at all that was attached to the impoundment of this vehicle. And once impounded it winds up on a lot where it is exposed, the windows are down, the doors are unlocked,

there is no enclosure completely surrounding it; and, as a matter of fact, there are two driveways through which the uncontradicted evidence shows that members of the public could easily have access to this automobile, deposited as it was back near what Officer Baker testified to be some bushes. And here is a regulation which requires that personal property having value which is found [fol. 261] be inventoried.

Now, it may be that Preston versus the United States will in some circumstances necessitate some modification of Section 12 of General Order No. 10. I don't make any suggestion to the Police Department in that regard, because I am not called upon to do so here. But the fact is that the police having lawfully come into possession of a motor vehicle which was unlocked, with the windows open and it was raining, decide to take some steps to better secure the vehicle and come across the registration card in the process of doing so.

I am unable to say as to whether or not in the Williams case the Municipal Court of Appeals viewed Section 12 of General Order No. 10 to be valid in any and all circumstances. But be that as it may, it is my conclusion as applied to the facts and circumstances of this particular case we have a situation that does not fall within the contemplation of the Preston doctrine.

Now, the Fourth Amendment proscribes searches and seizures which are unreasonable, but only those which are unreasonable. It does not proscribe all; and as the courts have recognized from time to time, whether a particular search or a particular seizure is or is not unreasonable must be determined largely by the facts of the particular [fol. 262] case. In most instances, owing to the number of cases that have been decided in the past, we have guides which have been laid down to steer us to this conclusion. But counsel seem to feel, and the Court agrees, that this is a case of first impression. I haven't been able to find another case any place in the country like this; and I have called upon all counsel in this case; and nobody else can suggest to me anything that is quite like it.

No court has as yet held that a taking of property under these circumstances is a violation of the Fourth

Amendment; and, gentlemen, I am not persuaded that I should be the first judge to so rule.

Now, on each of these two grounds independently of the other, it is my conclusion that the discovery of the registration card is not in violation of the Fourth Amendment; and for this reason, the motion to suppress must be denied. That will be the order of the Court. Does counsel have anything further before we proceed to trial tomorrow morning?

MR. EPSTEIN: No, Your Honor.

* * * *

[fol. 263]

Vacated By Order of the Court 3/10/66

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,256

JAMES H. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Mr. Paul H. Weinstein for appellant.

Mr. Allan M. Palmer, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney at the time the brief was filed, *Frank Q. Nebeker* and *David Epstein*, Assistant United States Attorneys, and *John R. Kramer*, Assistant United States Attorney at the time the brief was filed, were on the brief, for appellee. *Messrs. John C. Conliff, Jr.*, United States Attorney at the time of argument, and *Edwin C. Brown, Jr.*, Assistant United States Attorney at the time the brief was field, also entered appearances for appellee.

Before BAZELON, *Chief Judge*, and WASHINGTON and WRIGHT, *Circuit Judges*.

[fol. 264]

OPINION—Decided November 19, 1965

WRIGHT, *Circuit Judge*: Appellant's automobile was used as a getaway car. It was spotted leaving the scene of the robbery for which he was convicted below. The car was traced, and appellant was arrested later in the

day as he was getting into it. Appellant was taken to the police station, and a tow truck was called to impound the car. The car arrived at the station an hour and a half later and, according to police testimony, the arresting officer "secured" it pursuant to police regulations. This included placing a property tag on the auto, searching for and removing all valuables for safekeeping, and locking up the auto's windows and doors. The officer began by opening the left front door, tying a tag to the steering wheel, and examining the rear and front seats of the car, the floor, and the glove compartment. He then went around to the right rear door and opened it to roll up the window and lock the door. When he opened the right front door to repeat this process, he discovered, under the door, the automobile registration card of the robbery victim.

After a hearing on a motion to suppress this evidence, the trial court ruled the evidence admissible because the officer had seen the evidence in "open view" while acting pursuant to police regulations to protect the car and its contents and, alternatively, because the officer, at the moment he opened the right front door and saw the registration card, intended only to roll up the window to protect the car. On appeal the Government vigorously advances the argument that, since the auto was seized contemporaneous to the arrest as an instrumentality of crime, it came into the lawful custody of the police and could subsequently be searched without a warrant.

The "open view" doctrine does not help us here. In the course of its reasoning, the court relied by analogy upon *United States* v. *McDaniel*, D.D.C., 154 F.Supp. 1 (1957), *affirmed*, 103 U.S.App.D.C. 144, 255 F.2d 896, *cert. denied*, 358 U.S. 853 (1958), where officers entered a house with [fol. 265] consent and then saw the evidence (a towel) in open view. But in *McDaniel* the entry was lawful; whether the warrantless and unconsented entry into the auto in this case was lawful is the issue we must decide, since it was only after entering the auto that the officer saw the registration card. Compare *Caldwell* v. *United States*, 8 Cir., 338 F.2d 385, 388 (1964), *cert. denied*, 380 U.S. 984 (1965).

The entry cannot be justified merely because it was made pursuant to police regulation. The police cannot legalize unconstitutional searches simply by promulgating and acting pursuant to regulations, no matter how "reasonable" they may be. Compare *Spriggs* v. *United States*, 118 U.S.App.D.C. 248, 250-251, 335 F.2d 283, 285-286 (1964). Certainly evidence so obtained cannot be used against the accused. *Id.*, 118 U.S.App.D.C. at 251, 335 F.2d at 286. Compare *Boyd* v. *United States*, 116 U.S. 616 (1886). The trial court found, however, that the entry was lawful because the officer's intent, at the moment he discovered the evidence, was to roll up the window to prevent harm to the auto from the light rain then falling, rather than to search. But this finding does not necessarily justify the admission of the evidence seized. See *Spriggs* v. *United States*, *supra*; *Killough* v. *United States*, —— U.S.App.D.C. ——, ——, 336 F.2d 929, 933 (1964). Moreover, the facts in this case clearly demonstrate that the officer intended, generally, not only to protect the car from harm, but to search for and secure valuables. The officer admitted, and the trial court recognized, this more general intent (Tr. 241-242), and his action in searching the vehicle both before and after finding the registration card demonstrates it. That, at the moment he found the evidence, he was engaged in one aspect or another of the general course of conduct he had undertaken seems inconsequential.

The search can only be justified, therefore, if it falls within one of the two "exceptions to the requirement that [fol. 266] searches and seizures be undertaken only after obtaining a warrant," which are (1) where procuring a warrant is impracticable, and (2) where the search is incident to a lawful arrest. *United States* v. *Ventresca*, 380 U.S. 102, 106-107 (1965). No argument is made, nor can one be made, to bring this case within the first exception, so the search must either have been incident to a lawful arrest or be ruled unlawful.

A unanimous Supreme Court recently stated in *Preston* v. *United States*, 376 U.S. 364, 367 (1964):

> "* * * The rule allowing contemporaneous searches [of the person and place of arrest] is justified, for

example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. * * *"

The search in this case took place an hour and a half after the arrest, at a police station to which the car had been hauled. The accused was "under arrest and in custody" and the search was "made at another place."

While the pre-*Preston* cases are inconsistent in their interpretations of "contemporaneous," [1] the post-*Preston* [fol. 267] decisions of this court provide little support for the argument that the search in this case was contemporaneous. In *Smith* v. *United States*, 118 U.S.App.D.C. 235, 335 F.2d 270 (1964), we held unlawful a search of an auto which had been impounded right after the arrest the evening before. We reached the same result in *Bowling* v. *United States*, —— U.S.App.D.C. ——, —— F.2d —— (No. 18,693, decided June 24, 1965), where the search was made after the police had taken the car and its suspects to a service station some miles from the place

[1] Compare *Shurman* v. *United States*, 5 Cir., 219 F.2d 282, *cert. denied*, 349 U.S. 921 (1955) (unlawful for arresting officer to search car at scene of arrest upon return from placing suspect in custody); *Rent* v. *United States*, 5 Cir., 209 F.2d 893 (1954) (unlawful to search at 10:30 A.M. a car impounded at 1:00 A.M. after an arrest at midnight), with *Fraker* v. *United States*, 9 Cir., 294 F.2d 859 (1961) (dictum) (lawful to search suspect's impounded car an hour and a half after arrest); *Bartlett* v. *Unied States*, 5 Cir., 232 F.2d 135 (1956) (lawful to search suspects' car as soon as it reached garage); *Sisk* v. *Lane*, N.D.Ind., 219 F.Supp. 507 (1963), *affirmed on other grounds*, 7 Cir., 331 F.2d 235 (1964), *petition for cert. dismissed*, 380 U.S. 959 (1965) (search upheld where arrest took place at 7:00 A.M. and where both suspect and his car arrived at station simultaneously, though independently, at 8:00 A.M., when search was immediately begun).

of arrest. Other circuits are in accord,[2] and the cases upholding searches of autos are clearly distinguishable.[3] [fol. 268] In an ingenious effort to avoid the rule of *Preston*, the Government would have us uphold the search on the theory that, since the auto lawfully came into police custody as an instrumentality of crime seized incident to an arrest, it could subsequently be treated the same as any other piece of evidence.[4] This attempt to equate an automobile used in a crime with any other object, such as a weapon or a pair of shoes, has underlying merit. An auto is often essential to the commission of crime, frequently

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[2] *Simpson* v. *United States*, 10 Cir., 346 F.2d 291 (1965) (day after arrest); *United States* v. *Cain*, 6 Cir., 332 F.2d 999 (1964) (two hours after arrest).

[3] In *Price* v. *United States*, —— U.S.App.D.C. ——, 348 F.2d 68, *cert. denied*, —— U.S. —— (October 18, 1965), when the officers spotted the auto involved, they looked inside and saw part of the evidence eventually introduced. The suspect was arrested, and an officer brought his car to the station where a search was made and all visible objects removed. From 20 to 25 minutes later an officer noticed the lights of the suspect's car blinking on and off, and found a friend of the suspect reaching under the seat. He arrested the friend, took him to the station, and returned and found, under the seat, another piece of evidence which was introduced. The court, relying upon the "open view" doctrine, ruled that the first seizure was incident to the first arrest; the other piece of evidence was seized, reasoned the court, incident to the *second* arrest: the officer "came into its possession at the place of the arrest and contemporaneously with it; for the sequence followed by the officer, that is, first taking the arrestee into the station, was a reasonable and practical one and the brief time thus consumed did not destroy the contemporaneousness of the search." *Id.*, —— U.S.App.D.C. at ——, 348 F.2d at 70.

In *Crawford* v. *Bannan*, 6 Cir., 336 F.2d 505 (1964), "contemporaneous" was held to include a search at the place of arrest which took place a "few minutes" after the suspect was taken away in a wagon. In *Burge* v. *United States*, 9 Cir., 342 F.2d 408 (1965), *appeal docketed*, June 16, 1965, Misc. No. 262, police searched the suspect's auto without warrant seven days after his arrest. The court explained its decision on the ground that the police told the suspect at the time of arrest that they were seizing the auto pursuant to 18 U.S.C. § 782, which provides for forfeiture of autos used to transport narcotics for sale.

[4] The arresting officer testified, in fact, that the auto was seized as "evidence" in the case. (Tr. 34, 68.)

the very object of crime. For a number of reasons, however, the instrumentality theory is unacceptable.

To begin with, there is virtually no authority to support it. While the theory has not been explicitly rejected by either the Supreme Court or this court, both courts have held unlawful searches of autos which were instrumentalities of crime. *Carroll* v. *United States*, 267 U.S. 132, 156 (1925), with its command that "[i]n cases where the securing of a warrant is reasonably practicable, it must be [fol. 269] used * * *," and the whole line of contraband seizure cases involved autos which were instrumentalities.[5] The only support for the theory is in two cases which, in upholding searches on other grounds, mention, without relying on, the fact that the auto involved was an instrumentality.[6]

The dearth of support is understandable. To validate the instrumentality theory would carve another exception

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[5] Even in *Preston* it is arguable that the officers reasonably believed the car had been stolen, a position not inconsistent with the charge of vagrancy. The suspects had been parked in a business district for five hours. They admitted they were unemployed, and together they held 25 cents. "One of the men said that he had bought the car the day before (which later turned out to be true), but he could not produce any title." 376 U.S. at 365. See also *Smith* v. *United States, supra.*

[6] In *Price* v. *United States, supra* Note 3, this court stated that "[t]he indications were strong that the automobile had been used in the robbery and as a carrier of articles stolen * * *." —— U.S. App.D.C. at ——, 348 F.2d at 70. What significance the court attached to this fact is uncertain, since the entire opinion was devoted to showing that the officers had seen some of the evidence, that the evidence was seized at the same time as the arrests, and that the whole business had been an uninterrupted series of events.

In *Trotter* v. *Stephens*, E.D.Ark., 241 F.Supp. 33 (1965), the court, in upholding a search of an auto two hours after it arrived at the courthouse, stated that "Trotter's automobile was an instrumentality of the crime * * *," and that "[t]he car was obtained incident to and contemporaneous with Trotter's arrest * * *." But here, too, reliance was placed on the fact that the officer, who had reason to believe a rape had just taken place in the car, noticed at the time of arrest that the radiator was warm and that there were stains on the seat. Also the court argued that the search of the car two hours after the arrest "was merely part of one continuous act * * *." *Id.* at 41-42.

from the general rule against searches without warrants. The existing exceptions to the general rule that personal [fol. 270] property may be invaded only afted "a neutral and detached magistrate" has determined that probable cause for the invasion exists, *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), are dictated by practical necessity. The instrumentality theory presents no such compelling reasons for allowing the police to search without warrants.

Moreover, the implications of the instrumentality theory give reason to pause. If an auto is treated as a piece of evidence, it becomes irrelevant whether the search occurs at the place of arrest or elsewhere, at the time of arrest or much later. Nor need the police have any idea of what they are looking for—a consequence which undermines the protection the particularity requirement normally affords. See *Trupiano* v. *United States*, 334 U.S. 699, 710 (1948). Compare *Kremen* v. *United States*, 353 U.S. 346 (1957).

If an automobile used as an instrumentality of crime can be subjected to a general search without a warrant at the pleasure of the police, a home said to be so used could be subjected to the same treatment. The automobile, like the home, is a repository of the "papers, and effects" of "the people" as contemplated in the Fourth Amendment. Both may be used as instrumentalities of crime, but both may be searched only after obtaining a search warrant or at the time and place of the lawful arrest of the occupant. *Preston* v. *United States*, *supra*. Compare *Henry* v. *United States*, 361 U.S. 98 (1959). See *Jones* v. *United States*, 357 U.S. 493, 499-500 (1958).

Reversed.

Circuit Judge WASHINGTON did not participate in the foregoing decision.

[fol. 271]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Criminal 894-64

No. 19,256

[File Endorsement Omitted]

JAMES H. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Before: Bazelon, Chief Judge and Washington and Wright, Circuit Judges.

JUDGMENT—November 19, 1965

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court for further proceedings not inconsistent with the opinion of this Court.

Per Circuit Judge Wright

Circuit Judge Washington did not participate in the decision of this case.

Vacated By Order of the Court 3/10/66

[fol. 272]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,256

[File Endorsement Omitted]

JAMES H. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR REHEARING EN BANC—
Filed January 17, 1966

I. Preliminary Statement

Appellant's robbery conviction was reversed by a two-judge division of this Court on November 19, 1965.[1] The opinion, in appellee's judgment, erroneously extends *Preston* v. *United States*, 376 U.S. 364 (1964), to a set of facts not within the contemplation of the Supreme Court's ruling. For this reason and because the opinion establishes a binding precedent for future cases before this Court on a point of law never decided either by the Supreme Court or by this Court,[2] having important im-
[fol. 273] plications for the administration of criminal justice in that warrantless searches of vehicles by the police in similar "reasonable" circumstances will inevitably re-

[1] Senior Circuit Judge Washington heard argument in the case but did not participate in the decision.

[2] The instrumentality seizure theory was fully explored in the briefs and during oral argument in *Price* v. *United States*, —— U.S. App. D.C. ——, 348 F.2d 68, *cert. denied*, 382 U.S. 888 (1965), but the judgment was affirmed on another ground.

cur,[3] appellee respectfully urges the Court to rehear this case *en banc*.

A brief summary of the relevant facts is included for the convenience of the non-division members of the Court.

II. Facts

After Police Officer Casmir Morda observed appellant and two other men leaving the robbery scene in a 1953 green Ford with District license tag number 2X751, he telephoned the Sixth Precinct and described the getaway car. He also wrote the tag number down on a piece of paper, G.X. 3. The following morning he turned the written tag number, G.X. 3, over to Detective Baker and also described the robbers to him (Tr. 335-337, 345). Later that day after Baker saw appellant enter the getaway car on the driver's side he arrested him (Tr. 32-33, 44, 65). Appellant was ordered out and searched (Tr. 45). Officer Baker then looked into the car and saw only an open beer can; he may also have reached under the front seat for weapons (Tr. 61-62, 77). At the same time appellant was arrested a fellow officer arrested Jerry Hines—a co-defendant acquitted at trial—as Hines attempted to enter his car after having parted company [fol. 274] with appellant (Tr. 84-85). At the time of appellant's arrest Detective Baker decided to seize the car "as evidence" in the case because it was the very car described in the robbery outlook (Tr. 34, 68). Hines' car was not impounded because Detective Baker had no infor-

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[3] The applicability of the *Preston* rationale is a question which has frequently arisen in this jurisdiction before. See *Adams* v. *United States*, 118 U.S. App. D.C. 364, 336 F.2d 752 (1964), *cert. denied*, 379 U.S. 977 (1965) (Affirmed); *Smith and Anderson* v. *United States*, 118 U.S. App. D.C. 235, 335 F.2d 270 (1964) (Remanded with directions); *Price* v. *United States*, *supra* (Affirmed); *Bowling* v. *United States*, —— U.S. App. D.C. ——, 350 F.2d 1002 (1965) (Reversed); *Jefferson and Cooper* v. *United States*, —— U.S. App. D.C. ——, 349 F.2d 714 (1965) (Affirmed); *Pettas* v. *United States*, 203 A.2d 170 (D.C App. 1964) (Affirmed), *pet. for allowance of appeal denied*, No. 18884, October 30, 1964.

The following two cases, presently in various stages of appellate review, also appear to involve a *Preston* point: *Ray Jones, Jr.* v. *United States*, No. 19513; *James H. Hargrove* v. *United States*, No. 19614.

mation connecting that car with the robbery (Tr. 182, See Tr. 98).

[By defense counsel]

Q. Why was Mr. Harris's car impounded and not Mr. Hines?

A. Mr. Harris's car was described in the lookout, wanted in connection with the robbery, and so forth, and that is why his car was impounded.

Q. Did you consider the vehicle to be evidence?

A. Yes, sir. (Tr. 182.)

Accordingly, a few minutes after the arrest Baker called for a police crane to remove appellant's car to the Sixth Precinct while he and his partner took appellant and Hines there in the cruiser (Tr. 34, 36). About an hour and a half later the crane operator informed Baker that the car had been placed on the precinct lot, an area easily accessible to the public (Tr. 37, 38, 69-70, 87, 163).[4] The operator told Baker that it was raining out, but that he hadn't closed the windows, so Baker proceeded outside to lock the car and take care of protecting it against the rain as well as to put a property tag on it, identifying it in accordance with police practice dictated by General Order No. 10, Series 1958, Sections 11 and 12 (Tr. 38-39, 71-72, 163). The officer also wanted to remove all valuables wherever they might be found in the car, and list them on the property book per police regulations (Tr. 164). While he was thus securing the vehicle Detective Baker came upon the robbery victim's automobile registration card which rested on the threshold under the right [fol. 275] front door of appellant's car. It was exposed when he opened the door. (Tr. 165-167. See Tr. 40.)

III. Argument

The precise reasons for which the division rejected the Government's instrumentality seizure theory are not clear-

[4] The record also indicates that from the time Detective Baker decided to seize the car incident to appellant's arrest until it was brought to the precinct lot, an hour and a half later, the vehicle was in constant police custody (Tr. 48, 51-52, 59-60).

ly stated in the opinion. *Ex necessitate* the opinion holds either that A. appellant's car was not lawfully seized incident to his arrest or, B. even if it was so properly taken into custody a later search of it could not validly proceed without a warrant.

A. *Lawfulness of the car's seizure as an instrument of crime.*

Since appellant's car enabled him to make a quick getaway and was essential to the successful asportation of the fruits of the robbery, it was an integral part of the scheme and thus properly characterized as a means of committing the offense within Rule 41(b), Federal Rules of Criminal Procedure. It is indistinguishable as such from the rubber-heeled "getaway shoes" held validly seized incident to appellant's arrest in *United States* v. *Guido*, 251 F.2d 1, 3 (7th Cir. 1958). Indeed, appellant did not contest the lawfulness of the car's seizure before Judge Robinson.

> "I have to concede that the seizure of this automobile at the time he was arrested was valid." (Tr. 236.) (Appellant speaking through retained trial counsel.)

This concession was apparently relied on by the trial court when it ruled lawful the ensuing seizure of the registration card (Tr. 260).

One portion of the instant opinion which seems to argue against this result is the statement that validation of the instrumentality theory would "carve" another exception from the general rule against searches without warrants and that extant exceptions to the rule that personalty [fol. 276] may only be invaded after a magistrate has issued a warrant are dictated by practical necessity; a factor not supplied by appellee's theory of the seizure. (Slip op. at 7-8.)

The instrumentality theory, we submit, does not "carve" an *additional* exception to the general rule, it is merely the application of long settled principles of law to the seizure of but another instrument of crime. Neither logic nor expediency demand the insulation of getaway

cars from the firmly established "seizure incident to arrest" concept; the law of searches and seizures was not immutably fixed as of 1791 and should be flexible enough to allow the police to cope with the *modus operandi* of the modern day criminal. Nor, as is suggested by the opinion, do the exceptions to the general rule rest upon a foundation of "practical necessity." The police have an absolute right to search for and seize instruments of crime incident to a lawful arrest. *Harris* v. *United States*, 331 U.S. 145 (1947); *Abel* v. *United States*, 362 U.S. 217 (1960). This proposition was only recently affirmed by this Court in *Adams* v. *United States*, *supra*, 118 U.S. App. D.C. at 365, 336 F.2d at 753.

In one of the most far-reaching and novel passages of the opinion, the division seemingly exempts getaway cars from the normal operation of the rules governing searches and seizures of personalty by equating them with houses and affording such cars the same degree of protection thrown about the home. (Slip op. at 8.) To our knowledge this is the first time that any court has posited that analogy which, in effect, fashions a fundamental change in the law as previously announced and recently adhered to by the Supreme Court.

> "Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar." *Preston* v. *United States*, *supra*, 376 [fol. 277] U.S. at 366-367. *Accord Carroll* v. *United States*, 267 U.S. 132, 147 (1925).

In light of the historical basis of the Fourth Amendment the fear expressed in the opinion that "if an automobile used as an instrumentality of crime can be subjected to a general search without a warrant at the pleasure of the police, a home said to be so used could be subjected to the same treatment" (slip op. at 8), is not well founded. For the Government would be hard pressed indeed to

argue, aside from the impracticability of the situation, that a home—the object at the core of the Fourth Amendment's protection—could ever be seized, *in toto*, as an instrument of crime and then searched at the pleasure of the police. The argument would simply not stand up.[5] *Kremen* v. *United States*, 353 U.S. 346 (1957). See *Taylor* v. *United States*, 286 U.S. 1 (1932); *Ford and Kimble* v. *United States*, Nos. 17835-6, August 24, 1965 *(en banc)*; *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603); 18 U.S.C. § 3109.

Nor is there reason to believe that automobiles are any more the repositories for " 'the papers, and effects' of 'the people' " (slip op. at 8), than are the "people" themselves, whose wallets and purses are normally filled with all manner of personal papers and effects, and yet, a valid arrest of the person brings his "papers, and effects" into the lawful custody and control of the police. *People* v. *Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923) (Cardozo, J.); *Robinson* v. *United States*, 109 U.S. App. D.C. 22, 283 F.2d 508, *cert. denied*, 364 U.S. 919 (1960).

Since appellant's car was an instrumentality of crime within Rule 41(b), Federal Rules of Criminal Procedure —a characterization apparently accepted by the division— and thus subject to seizure in its entirety pursuant to warrant, *a fortiori*, it was validly seized incident to appellant's concededly lawful arrest.

[fol. 278]

B. *Lawfulness of the precinct search of appellant's car.*

Whereas appellant's car was lawfully seized, its later examination at the precinct at a time when it was in the *lawful dominion and control* of the police was likewise valid for no trespass against the property was committed by that examination. This was not a "search" within the meaning of the Fourth Amendment. It is this concept of a non-trespassory examination which validates the testing of lawfully seized guns, narcotics or any other

[5] House trailers, of course, might present other questions.

property at police laboratories without the prior approval of a magistrate.[6]

The opinion appears to reject the application of this well accepted premise to getaway cars when it states that such a later warrantless search "undermines the protection the particularity requirement normally affords." (Slip op. at 8.) As we understand the particularity requirement, however, it solely concerns objects *not yet* lawfully searched for and seized. It has no application to an instrument of crime lawfully taken into custody which is later examined. *Kremen* v. *United States, supra,* cited in the opinion, is not authority to the contrary. That case stands for two propositions, the continued validity of which we do not challenge:

1) The right to search a house incident to an arrest is limited and does not authorize an exploratory seizure of everything therein.
2) That limited right of incidental search is not expanded by the device of seizing the entire contents of a house to allow the officers a later more convenient examination of the mass of evidence. Once the *incidental right to search* a house has passed, that ends the matter.

Kremen does not purport to limit the authority of the police to examine a lawfully seized instrument of crime at another time and another place, that question was [fol. 279] never considered nor comprehended within the facts of the case.

Furthermore, in appellee's judgment, the instant decision is in direct conflict with the recent holding of the Ninth Circuit in *Burge* v. *United States,* 342 F.2d 408 (9th Cir.), *cert. denied,* 382 U.S. 829 (1965). That case sustained a search of a vehicle seven days after it had been seized pursuant to 49 U.S.C. § 782. However, the particular basis upon which a vehicle is *lawfully* seized is immaterial to the consequences flowing therefrom; in

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[6] For a more complete analysis of why a validly seized instrument of crime can be later examined without further warrant, see appellee's brief in *Price* v. *United States, supra,* at 8-10.

Burge it was probable cause to believe that the car had carried narcotics and in the instant case it was probable cause to believe that the car was an instrument of crime and seizable as such pursuant to Rule 41(b). In both cases when the automobiles were later examined and incriminating evidence found, they were in the "lawful custody" of the authorities.[7] (342 F.2d at 414). *Accord*, *Drummond* v. *United States*, 350 F.2d 983, 987-988 (8th Cir. 1965); *Sirimarco* v. *United States*, 315 F.2d 699 (10th Cir.), *cert. denied*, 374 U.S. 807 (1963).[8]

> "If the agent's version is to be accepted, the car's search following the seizure, when it had remained in continuous and proper government custody, was [fol. 280] not an unreasonable one within the prohibition of the Fourth Amendment. . . ." *Drummond*, *supra*, at 988.

In addition, the examination of appellant's car was especially reasonable herein because Detective Baker was proceeding pursuant to a police regulation—not invalidated by the division—when he found the evidence in question. Metropolitan Police Department General Order Number Ten, Series 1958, issued pursuant to the authority vested in the Chief of Police or his delegates pursuant

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[7] It is apparent from the opinion in *Burge* that at the time the evidence was found, the car had not yet been declared forfeited in an *in rem* libel proceeding. (342 F.2d at 414.) As to those proceedings under 49 U.S.C. §§ 781-788, see *Colonial Finance Co.* v. *United States*, 210 F.2d 531 (6th Cir. 1954); *United States* v. *One 1951 Cadillac Coupe*, 139 F.Supp. 475 (E.D. Penn. 1956); *United States* v. *One 1952 Buick Special Rivera Auto*, 136 F.Supp. 253 (D.C. Minn. 1955).

[8] *Price*, *supra*, and *Bowling*, *supra*, also conflict with each other—both in their results and theoretical approaches to these so-called car cases. The opinion's treatment of those two cases leaves little room to doubt, however, that the division is exhorting the District Court to be guided by the more stringent *Bowling* test in future rulings. While this may result in uniformity of judgment below, and thus in the demise *in limine* of some otherwise meritorious prosecutions, it is far from clear, after comparison of the relevant pecedents, that the *Bowling* decision reflects the viewpoint of a majority of this Court *en banc*.

to Reorganization Order for the District of Columbia, No. 46, Title I, Administration, Appendix, D.C. Code, provides in pertinent part of Section 12:

> "When a vehicle is brought to a station, whether impounded, stolen, abandoned, or taken from a prisoner, it shall be the responsibility of the officer who takes the vehicle in charge to thoroughly search such vehicle, including the glove compartment and trunk, and remove all property therefrom. He shall be held responsible for seeing that all such property is recorded and properly safeguarded."

Certainly there could be nothing more reasonable than, at the earliest possible moment after appellant's car was delivered to the precinct parking lot, to secure that car against the immediate hazard of injury from the rain that was starting to fall and the future threat of depredation of its contents while it remained on the lot, easily accessible to any member of the public who wanted to loot it. These were the very objects Officer Baker had in view, as the trial court found (Tr. 241-242, 249, 254-255, 257-258, 260), when he left the station house and went out to the car. Parenthetically, this is the very same precinct lot, Number 6, which was involved in *Price* v. *United States, supra,* wherein an unauthorized person was found in Price's car as it stood on the police lot, "reaching under the front seat of the car," 348 F.2d at 69—and where, after the intruder's arrest, another piece of evidence was found under that seat.

[fol. 281] Although the division states that "[t]he police cannot legalize unconstitutional searches simply by promulgating and acting pursuant to regulations, no matter how 'reasonable' they may be . . . [and that] [c]ertainly evidence so obtained cannot be used against the accused" (slip op. at 3), it was recognized in *Ross* v. *United States,* —— U.S. App. D.C. ——, 349 F.2d 210, 213 (1965), that police practices which are based upon a balanced accommodation of fairness to the accused and police efficiency might very well survive constitutional challenge. Certainly the instant regulation meets that balancing test as did the procedures reviewed in *Stroud* v. *United States,* 251

U.S. 15 (1919). In that capital case letters written by Stroud after the homicide, while he was in prison, were turned over to the warden under prison practice who in turn furnished them to the prosecutor. In sustaining their introduction at trial the Supreme Court observed:

> "In this instance the letters were voluntarily written, no threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of the officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights." (251 U.S. at 21-22).

Use of the evidence obtained herein through the normal operation of a general regulation aimed at safeguarding property in police custody—a regulation not designed to secure evidence for criminal prosecution—is also sustained by the holding of the Supreme Court in *Frank* v. *Maryland*, 359 U.S. 360 (1959). See also *Johnson* v. *United States*, 110 U.S. App. D.C. 351, 293 F.2d 539 (1961), *cert. denied*, 375 U.S. 888 (1963); *Campbell* v. *United States*, 174 A.2d 87 (Mun. App. D.C. 1961) (Pistol found on floor of unattended car after officer opened car door to retrieve a key left in the ignition in violation of District law, held validly seized).

[fol. 282] *Preston*, deemed dispositive by the division, dealt only with (a) searches incident to arrests and (b) exceptional searches of automobiles based on exigent circumstances. In the circumstances of that case the Court held the searches unreasonable under either theory. The car therein could not possibly have been seized as an instrumentality of the crime of vagrancy (the basis for the arrests) and, accordingly, the Court had no occasion to deal with that kind of a seizure. When the Newport, Kentucky police searched the car at the garage it was strictly an exploratory adventure into what was held on the facts to be a constitutionally protected area. Just because the officers may have previously gotten hold of the

car put them in no better stead than the agents in *Kremen, supra.* On those facts it is unwarranted to assume that the instrumentality theory was rejected by the Supreme Court *sub silentio.*[9]

[fol. 283] When *Preston* is thus matched against the facts of the instant case it simply fails, in our view, as controlling authority. Its application as such to warrant reversal of appellant's conviction is therefore an erroneous extension of the *Preston* rationale to truly "reasonable" police conduct. "It is a peculiar virtue of our system of law," observed Justice Brandeis, "that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen." (*Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 619 (1926)).

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[9] Nor does the division's speculation in footnote 5 give greater scope to the *Preston* holding. While "[a]lternative contentions [may be] the familiar stuff of the law". (*Scott* v. *Macy*, —— U.S. App. D.C. ——, 349 F.2d 182, 186 (Opinion of McGowan, J.)), the Solicitor General would be ill-advised to urge merely "arguable" or colorable theories to the Supreme Court.

There is an equally important reason why an instrumentality theory argument in *Preston* would have been unwise, *i.e.*, it was never urged before the two lower courts. *Cf. United States* v. *Sykes, et al.*, 305 F.2d 172, 174 (6th Cir. 1962). The Supreme Court has previously rejected such late arrivals in no uncertain terms:

> "In the two lower courts the Government defended the legality of petitioner's arrest by relying entirely on the validity of the warrant. In this Court, however, its principal contention has been that the arrest was justified *apart* from the warrant. . . .
>
> We do not think that these belated contentions are open to the Government in this Court and accordingly we have no occasion to consider their soundness. To permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond." *Giordenello* v. *United States*, 357 U.S. 480, 487-488 (1958) (footnote omitted).

Significantly, the Court did add in reversing the conviction, "[t]his is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant." 357 U.S. at 488.

In sum, we fail to see where the "constable has blundered" herein.

CONCLUSION

Wherefore, the appellee respectfully requests this Court to rehear this case *en banc*.

/s/ DAVID G. BRESS,
United States Attorney.

/s/ FRANK Q. NEBEKER,

/s/ ALLAN M. PALMER,
Assistant United States Attorneys.

CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

/s/ ALLAN M. PALMER,
Assistant United States Attorney.

[fol. 284]

[Certificate of Service Omitted in Printing]

[fol. 285]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,256
Criminal 894-64

[File Endorsement Omitted]

JAMES H. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Before: Bazelon, Chief Judge; and Fahy, Danaher, Burger, Wright, McGowan, Tamm, and Leventhal, Circuit Judges, in Chambers.

ORDER GRANTING PETITION FOR REHEARING EN BANC—
Filed March 10, 1966

On consideration of appellee's petition for rehearing *en banc*, it is

ORDERED by the court *en banc* that the aforesaid petition be granted; and the judgment and opinion of this court, entered herein on November 19, 1965, is vacated.

Per Curiam.

[fol. 286]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,256

JAMES H. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

* * * *

Mr. Paul H. Weinstein for appellant.

Mr. Allan M. Palmer, Assistant United States Attorney, with whom *Mr. David C. Acheson*, United States Attorney at the time the brief was filed, *Messrs. Frank Q. Nebeker*, *David Epstein*, Assistant United States Attorneys, and *Mr. John R. Kramer*, Assistant United States Attorney at the time the brief was filed, were on the brief for appellee. *Mr. David G. Bress*, United States Attorney, also entered an appearance for appellee.

[fol. 287]

OPINION ON REHEARING EN BANC—
Decided December 6, 1966

Mr. Dennis G. Lyons, appointed by this court as amicus curiae on behalf of appellant.

Before BAZELON, *Chief Judge*, FAHY, *Circuit Judge*, WASHINGTON, *Senior Circuit Judge*, DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM and LEVENTHAL, *Circuit Judges*.

Per Curiam: This appeal from a robbery conviction was ordered reheard by the court *en banc*, thereby vacating the earlier disposition by the panel, because it appeared to present broad issues with respect to the search of automobiles by the police under a departmental regulation addressed to the securing of the contents of impounded cars. We were variously urged by the Government to proclaim a general doctrine of the amenability of automobiles to warrantless search as instrumentalities of crime, and by the defense to declare the regulation invalid on its face. On closer examination, however, we do not think this case, at least in the posture it reaches us, presents us with such far-ranging alternatives. In particular, we are, as the trial judge said of himself, "not called upon" to deal "with the broad question of the right of police officers to conduct searches of motor vehicles not contemporaneous with an arrest of the defendant at all times and all places."

The car in question was observed leaving the place where the robbery occurred. It was found several hours later, and appellant was arrested as he was getting into it in front of his home. Appellant was taken promptly to the precinct police station, the arresting officer having first made a call for the police towing crane to come and take the car to the station also.[1]

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[1] There is no issue before us as to the propriety of the police seizure of the car itself. This was conceded by the defense at trial, and is unchallenged here. The officer testified that, at the scene of the arrest, he made a quick but fruitless scrutiny of the interior of the car to see if there were any weapons. He also testified that his purpose in calling the crane was to impound the car as possible evidence itself of the commission of the crime. Once impounded, his purpose in examining it further was simply to carry out his duties under the regulation applicable to all cars of which the police find themselves lawfully possessed and for which they have a responsibility. Were we compelled to come to grips with Fourth Amendment considerations in this case, this testimony might perhaps be of great relevance, at least in defining with precision such issues as the degree of contemporaneity required between arrest and search for criminal evidence, and the differences, if any, for Fourth Amendment purposes between the usual search of this nature, on the one hand, and an inventory search under a housekeeping regulation, on the other.

[fol. 288] The arrest was made at about 1:30 P.M. At 3:00 P.M., the crane operator came into the police station and told the arresting officer that he had just placed the car on the station parking lot. He said that, although it was raining and the windows were down, he had not rolled them up to protect against the rain because he was afraid of disturbing finger prints. The arresting officer testified that he went out immediately to the car for two purposes. One was to inventory its contents as required by the regulation, and the other was to roll up the windows because it was raining. Accomplishment of the former purpose was begun by opening the door on the driver's side of the car; and a complete examination of the interior of the car was made through, and by means of, this mode of entry. Having completed this examination, the officer then went around to the other side of the car for the sole purpose of rolling up the windows. When he opened the right front door for this purpose, there came into his view a registration card which had been lying on the door jamb concealed by the closed door. This was the card of the robbery victim which had been contained in the wallet taken from him in the robbery.[2] It is claimed that it should have [fol. 289] been excluded from the evidence at the trial because of the illegality of the search which disclosed it.

We state the foregoing facts as they were found by the trial judge who heard the evidence on the motion to suppress. The matter of credibility was very much in the judge's mind, and he adverted to it at length in his findings.[3] He concluded from the facts as he found them that

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[2] The officer testified that, after bringing appellant out to look at the card where it lay, the card was taken up and into the station where it was placed in an envelope for delivery to the Police Property Clerk. The officer thereafter went [redacted] again to the car and completed his inventorying under the regulation by opening the trunk at the back of the car. A day later the officer got a search warrant directed to the Police Property Clerk, and it was under this warrant that the card was yielded up for use as evidence.

[3] The trial judge participated at length in the examination of the arresting officer about the circumstances of the discovery of the evidence sought to be excluded. Indeed, after the arresting officer had completed his testimony and been excused, he was later recalled

the officer had opened the right front door solely for a lawful purpose (*i.e.*, to roll up the window to protect [fol. 290] against the rain), and that that action brought into open view a piece of incriminating evidence. There was, in his view, no search at all in relation to this particular evidence, and therefore, no Fourth Amendment issue inescabably requiring resolution. *Hester* v. *United States*, 265 U.S. 57, 59 (1924).

We can reach such an issue only by refusing to accept the facts as they have been found by the judge who heard the evidence and who made precise and explicit findings on the basis of what he heard. Our own reading of the record does not provide us with any warrant for such a rejection. The case strikes us as something of a factual sport, but by no means an incredible one in the light of everyday experience. It is, in any event, an inappropriate vehicle for appellate resolution of the large and important issues pressed upon us.

The conviction is affirmed.

FAHY, *Circuit Judge, dissenting:* I agree with Judge Wright that the order granting the en banc application should be vacated as improvidently granted and the division opinion of the court, which follows the rule of *Preston* v. *United States*, 376 U.S. 344 (1964), should be reinstated.

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at the court's instance in order that he might tell his story again. At the request of both sides, the court asked the questions which elicited again the officer's detailed account of what took place in connection with the examination of the car at the police station. The court's own characterization of the witness's testimony is as follows:

> "The Officer, I think, has been very frank in his testimony. Where there have been things that may not have been particularly helpful to the Government's case, he has told us about those things; and I have no reason to discredit his statement as to which I don't think there can be any possible mistake, because, as I have stated to counsel, he was asked about it twice, and he was very emphatic about it. I must conclude as a matter of fact that he opened that door simply for the purpose of operating the window, raising the mechanism so that that window might be raised."

WRIGHT, *Circuit Judge, dissenting:* A rehearing *en banc* was granted in this routine criminal appeal because the Government determined to use this case as a platform for launching its novel instrumentality theory with respect to the search of automobiles. The court, however, now avoids the instrumentality issue and decides that the police, at the moment they found the evidence in question, were not searching the car after all. Since the court *en banc* finds [fol. 291] it unnecessary to come to grips with the *en banc* issue, the order granting the *en banc* application should be vacated as improvidently granted, and the panel opinion [1] of this court, which follows the rule of *Preston* v. *United States*, 376 U.S. 364 (1964), should be reinstated.

I respectfully dissent.

[1] The panel opinion is made part hereof as an appendix.

[fol. 292]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,256
Criminal 894-64

[File Endorsement Omitted]

JAMES H. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
For the District of Columbia.

Before: Bazelon, Chief Judge, Fahy, Circuit Judge, Washington, Senior Circuit Judge, and Danaher, Burger, Wright, McGowan, Tamm and Leventhal, Circuit Judges, sitting *en banc*.

JUDGMENT—Dated December 6, 1966

This case came on to be reheard *en banc* on the record on appeal from the United States District Court for the District of Columbia, and was reargued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court *en banc* that the judgment of the District Court appealed from in this case is hereby affirmed.

Per Curiam

Separate dissenting opinion by Circuit Judge Fahy.

Separate dissenting opinion by Circuit Judge Wright.

[fol. 293]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 294]

SUPREME COURT OF THE UNITED STATES

No. 1141 Misc., October Term, 1966

JAMES H. HARRIS, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—April 17, 1967

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1279 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 267290 1001